Author:
U.S. Congress.

Title:
Resale price maintenance

Place:
Washington, D.C.

Date:
1936

95-82371-13

MASTER NEGATIVE #

COLUMBIA UNIVERSITY LIBRARIES
PRESERVATION DIVISION

BIBLIOGRAPHIC MICROFORM TARGET

ORIGINAL MATERIAL AS FILMED - EXISTING BIBLIOGRAPHIC RECORD

U.S. Congress. Senate. Committee on the judiciary.

Resale price maintenance. Hearing before a subcommittee of the Committee on the judiciary, United States Senate, Seventy-fourth Congress, second session, on S. 3822, a bill to amend the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890. March 13, 1936... Washington, Govt. print. off., 1936.

iii, 72 p. 23cm.

Bibliography: p. 14-16.

RESTRICTIONS ON USE:

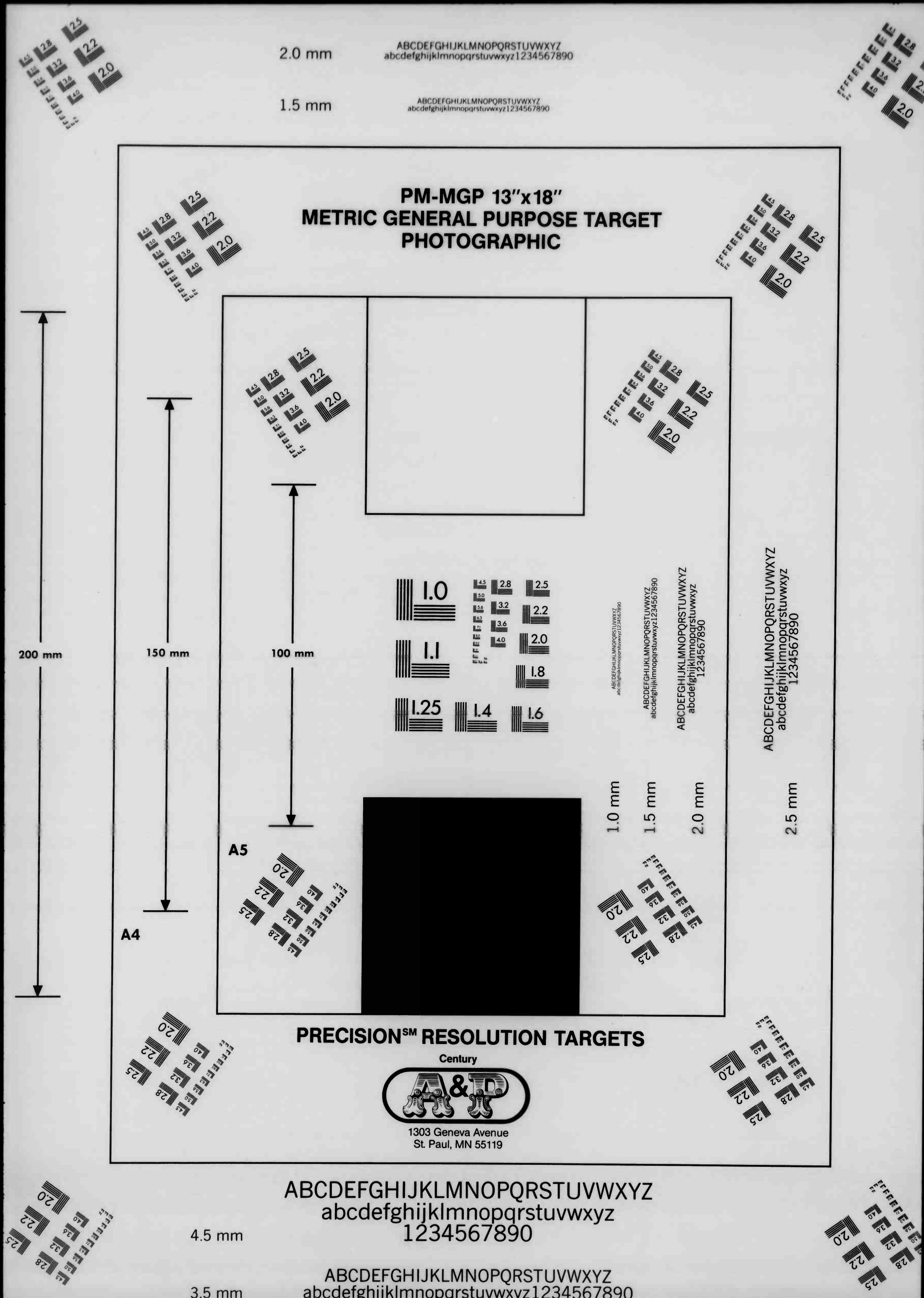
TECHNICAL MICROFORM DATA

FILM SIZE: 35mm   REDUCTION RATIO: 12x   IMAGE PLACEMENT: IA IIA IB IIB

DATE FILMED: 2-20-95   INITIALS: PB

TRACKING # : MSH 05120

FILMED BY PRESERVATION RESOURCES, BETHLEHEM, PA.


2.0 mm
ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz1234567890
1.5 mm
ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz1234567890
PM-MGP 13"x18"
METRIC GENERAL PURPOSE TARGET
PHOTOGRAPHIC
200 mm
150 mm
100 mm
A5
A4
1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
1.0 mm
ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz1234567890
1.5 mm
ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz1234567890
2.0 mm
ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz
1234567890
2.5 mm
ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz
1234567890
PRECISION℠ RESOLUTION TARGETS
Century
A&P
1303 Geneva Avenue
St. Paul, MN 55119
4.5 mm
ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz
1234567890
3.5 mm
ABCDEFGHIJKLMNOPQRSTUVWXYZ
abcdefghijklmnopqrstuvwxyz1234567890

U.S. Congress. Senate.
Committee on the
Judiciary
–
Resale Price Maintenance:
–
Hearing.

RESALE PRICE MAINTENANCE

HEARING

BEFORE A

SUBCOMMITTEE OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SEVENTY-FOURTH CONGRESS
SECOND SESSION

ON

S. 3822

A BILL TO AMEND THE ACT ENTITLED "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES", APPROVED JULY 2, 1890

MARCH 13, 1936

Printed for the use of the Committee on the Judiciary

UNITED STATES
GOVERNMENT PRINTING OFFICE
57070 WASHINGTON : 1936

COMMITTEE ON THE JUDICIARY

HENRY F. ASHURST, Arizona, *Chairman*

WILLIAM H. KING, Utah
M. M. NEELY, West Virginia
FREDERICK VAN NUYS, Indiana
PATRICK McCARRAN, Nevada
M. M. LOGAN, Kentucky
WILLIAM H. DIETERICH, Illinois
GEORGE McGILL, Kansas
CARL A. HATCH, New Mexico
EDWARD R. BURKE, Nebraska
KEY PITTMAN, Nevada
TOM CONNALLY, Texas
JOSEPH C. O'MAHONEY, Wyoming
WILLIAM E. BORAH, Idaho
GEORGE W. NORRIS, Nebraska
DANIEL O. HASTINGS, Delaware
WARREN R. AUSTIN, Vermont

SUBCOMMITTEE ON S. 3822

CARL A. HATCH, New Mexico, *Chairman*

GEORGE McGILL, Kansas
WARREN R. AUSTIN, Vermont

CONTENTS

RESALE PRICE MAINTENANCE

FRIDAY, MARCH 13, 1936.

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee was composed of Senators Hatch (chairman), McGill, Van Nuys, Borah and Austin, and convened in the committee room, Capitol, at 10 a. m.

Present: Senators Hatch (chairman), McGill, and Austin.

Present also: Hon. Millard E. Tydings, a Senator from the State of Maryland.

The subcommittee had under consideration S. 3822, a bill to amend the act entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraint and Monopoly", approved July 2, 1890. Said S. 3822 is here printed in full, as follows:

[S. 3822, 74th Cong., 2d sess.]

A BILL To amend the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, is amended by striking out the period at the end of the first sentence thereof and inserting in lieu thereof a colon and the following: "*Provided*, That nothing herein contained shall render illegal contracts or agreements prescribing minimum prices or other conditions for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer of such commodity and which is in free and open competition with commodities of the same general class produced by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is made, or to which the commodity is to be transported following such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes', approved September 26, 1914."

Senator HATCH. Senator Tydings, we will proceed with the proponents of the bill according to the schedule previously announced. Do you have a list of the witness and the order in which they are to be called?

Senator TYDINGS. Yes, Mr. Chairman.

Senator HATCH. Will you attend to that?

Senator TYDINGS. Yes.

Senator HATCH. You may proceed.

Senator TYDINGS. I will first call Mr. Edward S. Rogers, of Chicago, Ill., member of Illinois bar and of the New York bar; lecturer on trade marks, unfair competition, University of Michigan; University

of Pennsylvania, and at one time University of Chicago, Yale University and Georgetown; chairman of the committee on trade marks, unfair competition of the Association of the Bar of the City of New York; chairman, similar committee, American Bar Association; for several years chairman, section of patent trade mark copyright law, American Bar Association; chairman, section of patent trade mark copyright law, Illinois State Bar Association; American delegate, member of executive committee of the Inter-American Commission for the Protection of Industrial Property; president of the permanent committee for the Protection of Industrial Property, Paris; legal advisor to the committee and National and State Fair Trade Acts of the National Association of Retail Druggists.

STATEMENT OF EDWARD S. ROGERS, CHICAGO, ILL.

Mr. ROGERS. Mr. Chairman and gentlemen of the committee, I am here at the request of the fair trade committee of the National Association of Retail Druggists. I am not representing any grocers' association or other committees of which I am a member.

It seems to me that this bill presents a question of law; still in order to see it in proper perspective, the economic and social background ought to be understood. For many years there has been much discussion of the question whether it is economically sound and in the public interest to advertise and sell trade-marked goods at prices which yield little or no profit to the distributor. If not, then what is the remedy? Ought the producer to have the right to fix stop-loss prices on goods sold under his (the producer's) trade mark or brand, in order to prevent distributors from using them as a competitive weapon against one another.

There never has been any question of the right of a man in private business selling goods identified by his own trade mark as his and in competition with other goods produced by others, to fix the price at which he may sell them to his immediate customers. The trouble arises when he attempts to fix the price below which his customers shall not resell them.

As long as the producer deals directly with the retailer, there is no difficulty. The producer may bring himself in direct contact with the retailer, or indeed with the consumer by establishing agencies or by consigning his goods. This method has been adopted by the General Electric Co. and the Supreme Court has upheld it. But this is an expensive procedure, and can only be used by large manufacturers with ample capital. The small producer, who must avail hmiself of the established channels of distribution, is seriously handicapped because since 1911, the minute he passes title to the physical merchandise, he can no longer exercise any control over the price at which his vendee may sell. Contracts which attempt to control resale prices after goods are sold (if they affect interstate commerce), have been held to violate the Sherman law (*Miles* v. *Park*, 220 U. S. 373), and to be an unfair method of competition under the Federal Trade Commission Act (*Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441).

From the manufacturers' standpoint, the argument in favor of controlling resale prices can easily be summarized. He must depend upon wholesale and retail dealers to get his goods into the hands of the

public. He advertises to the public and makes his trade mark known. The public, in response to this advertising, demands his goods at retail outlets. As long as the retailer in the sale of the goods is assured of a profit, or at least insured against loss, he is willing to handle them. The same applies to the wholesaler. If a man does not make a profit he cannot stay in business.

But many years ago the cut-rate idea began to develop among both wholesalers and retailers—the purpose being, by selling identified goods which had an established value known to the public at prices conspicuously less, to create an illusion in the public mind that everything in the store is sold at a corresponding reduction; and thus represent that money can be saved by trading at this store. One cut usually produces others by competitors in retaliation, and a cut-price war starts with the result that in a short time dealers in a particular community sell the merchandise at cost or below, nobody making any profit. The goods are then sold reluctantly or not at all. Thus the manufacturer is deprived of a market, through no fault of his own. When the possibilities of one well-known article were exhausted, others are similarly treated. The consequence is that the price cuts on reputable identified goods soon get to a point that the more that are sold the greater is the aggregate loss.

This infection spread until a few years ago a point was reached where few advertised goods were handled by any dealers at any profit. The first agitation for stop-loss prices came from the retailers, who saw themselves likely to be driven out of business by the chain and department stores who had a large number of items or departments on which they could recoup the losses sustained on the so-called "loss leaders." Some manufacturers who had more foresight than others began to feel that their business was imperiled, because it was conceivable that if their goods could not be sold by anybody at a profit, they would eventually not be sold at all. Other manufacturers took the more short-sighted view that regardless of profit, their advertising could force dealers to stock their goods to supply the demand which the advertising would create.

Pressure was put on the manufacturers by their distributors and all manner of plans were devised to remedy the situation. In the meantime, the business with which I am most familiar—the drug business—became thoroughly demoralized. Distribution of well-known goods was seriously hampered and markets were destroyed; and the druggist, particularly the small druggist, found himself in the position where his chance of survival was more than doubtful.

And here may I digress long enough to indicate that it is my belief that it is greatly to the public interest to have the small retail druggist survive. One can get along without the small local retail grocer, although it may be inconvenient; but the drugstore is something else. If a child is taken sick at night, there is no time to go downtown to a chain store. The neighborhood drugstore is the only place where the necessary medicines can be had; and if the neighborhood druggist cannot make a profit out of his business, he cannot stay in it.

Senator HATCH. The chain stores do not handle prescriptions, do they?

Mr. ROGERS. Many of them do. Indeed, I think all the chain drugstores do. The department stores probably do not.

Now, taking up the matter of the consumer, superficially, it would seem that if the consumer is able to get well-known and reputable goods at cut prices, he gains by it. But on the other hand, if the small drugstore is not going to survive, the consumer suffers. Again, if it is desirable that the consumer be able to get well-known items, there must be distribution for them. And finally, while a particular "loss leader" may be a bargain, the ordinary consumer does not get the benefit of it, because the price cutter knows as every gambler knows the frailties of human nature.

The only way the consumer can benefit by a loss-leader sale is to go into the store, buy as much as he can of the particular goods that are being sold at cut prices, and turn around and go out—buying nothing else. The minute the customer yields to the blandishments of the salesman, and buys other goods, he starts to lose any saving he may have made in the purchase of the cut-price merchandise. He saves nothing, for example, when he buys at 29 cents a tooth paste which ordinarily sells at 45 cents, if at the same time he permits himself to be persuaded to buy for 50 cents a tooth brush which is worth 15 cents, or some unknown mouth wash at 50 cents which is worth 10 cents.

The only way for the consumer to beat the game is to buy the bargain and not buy another thing. The price-cutter knows that the cutter will not do this, just as the gambler knows that the sucker who stays by the game always loses. The only way to beat the loss-leader game is to quit when you are ahead. The fact that cut-rate stores exist is proof that they make money. They certainly cannot on the "loss-leaders"—they are merely bait.

Their profit must therefore come from the sale of merchandise of unknown quality upon which they can get a higher mark-up than is possible on standard goods of known value.

Various States (beginning with California in 1931) became convinced that the sale of identified goods at cut prices was an unsound commercial practice, and that the producer of those goods ought to be permitted by contract to establish the prices below which his goods should not be sold. A law was passed, called the California Fair Trade Act, which declared such contracts lawful.

There is no doubt that the demoralization of the retail trade required a remedy. There is further no doubt that a very respectable body of opinion was convinced that the loss-leader practice was one of the causes of this demoralization. So California, followed by other States, enacted these so-called fair trade acts, I think 12 in number.

Senator Austin. Have you a list of those States?

Mr. Rogers. I can furnish a list, and will be glad to do so.

It seems to me that there can be no doubt of the competency of the States to determine for themselves what their public policy may be, and to legislate, with respect to their own geographic limits, in accordance with the policy that they thus determine. If it be conceded that the right exists to declare such contracts in restraint of trade it must follow that the right exists to declare that they are not. What is and what is not in restraint of trade is a matter of public policy and this is a matter for the legislature of each State to determine for itself, limited, of course, to the extent of its geographical jurisdiction. Herein is apparently a head-on collision getween Federal and State public policy.

The Federal courts, in the *Beech-Nut* and *Miles cases*, held that attempts to fix retail prices in interstate commerce by contract were in violation of the Sherman law and the Federal Trade Commission Act. Twelve different States have determined as a matter of their own public policy that those contracts are legal.

Senator Austin. That is because of section 5 of the Federal Trade Commission Act and the Sherman law?

Mr. Rogers. Yes. No; these contracts are not specifically referred to in the Federal act. Section 5 provides that unfair methods of competition are unlawful. I do not know whether it can be said as a matter of law that there is a distinction between a National and State public policy, but if there is such a distinction, then these decisions to which I have referred are to the effect that it is contrary to Federal law to permit those contracts which a number of States have approved within their jurisdiction.

Senator Austin. That is the public policy which you characterize as national?

Mr. Rogers. Yes; but it is only a matter of judicial interpretation. The courts have held that, the making of these contracts being unlawful, it is an unfair method against the men who do not make them. But it is a rather involved and somewhat esoteric construction of language that probably was never intended to cover such a thing.

But to go back, there is no way of telling a priori, whether the States which have enacted fair trade acts are correct in their diagnosis of the difficulty and their prescription to cure it, until the remedy has been tried. Undoubtedly there is demoralization in the retail trade. These States say the cut-price evil is one cause of it. They are taking steps to permit producers to guard against and protect themselves against cut prices. Maybe the plan will work, and maybe it will not. The only way to tell is to give it a fair chance. The purpose of the so-called Fair Trade Enabling Act is to remove an obstruction which now exists to the working out of the remedy.

I have the very definite feeling that, with respect to goods originating, for instance, outside California and sold only inside California, that this is purely an intrastate transaction so far as sales in California are concerned, and that the Federal Government has no control under the commerce clause over contracts operating only in the State of California prescribing minimum resale prices on the goods sold in that State.

Senator Hatch. There is some conflict of opinion on that.

Mr. Rogers. Yes.

The mere fact that goods may originate outside the State and be transported into it does not make a contract with respect to their resale when they arrive, operative only within the State, a contract within Federal jurisdiction. But others, whose opinion is perhaps entitled to greater respect than mine, take a different view. Some of them say that, these contracts being permitted in intrastate commerce, and the goods entering into interstate commerce, the whole thing comes under Federal control and these decisions which have held contracts are illegal. These States want to be given a chance to fairly try out this public policy, which they think will remedy the difficulty inside their own geographical limits. The only way that can be tested is to give this public policy these States have adopted

a fair opportunity to prove itself, so the people can find out whether it works or not.

The purpose of this bill, then, is only to remove a possible obstruction to the free operation of the economic policy determined by each State for itself, so that this policy can be given a fair opportunity to prove itself and the people can find out if it is sound.

Taking up now S. 3822, it provides that contracts which are legal under the fair-trade acts of various States shall not be considered illegal under the Sherman Antitrust Act. The language used is that of the State fair-trade acts. S. 3822 is limited in its operation to States where these statutes are in force, or where under the common law these contracts are valid. There are a number of States that have enacted laws declaring retail stop-loss contracts valid, such as Pennsylvania, Kentucky, Oklahoma, for example, and others. There are other States where the common law recognizes these contracts to be valid. I may say that practically every country in the world recognizes that a manufacturer has an interest in the goodwill of his business, and should be able to determine by contract how his goods shall be sold. That has always been the law in England and in other countries.

Senator HATCH. I do not want to interrupt you, but in my own State we have a very strict antimonopoly statute against contracts in restraint of trade. In such States is there a necessity for such legislation?

Mr. ROGERS. If those States also have a statute permitting the making of the so-called fair-trade contracts, there is no demand for it; but if there is no such statute and the antimonopoly statutes are in force, the bill before you would not have any effect at all.

Senator MCGILL. It would not affect the Federal act if a State had its so-called fair-trade law?

Mr. ROGERS. Not at all. The only purpose is to permit these States to determine what their public policy shall be.

Senator HATCH. The point I was thinking about is, having that strict antimonopoly statute and no fair-trade contract statute, the principle of the common law would not apply to a state such as I have mentioned.

Mr. ROGERS. Probably not.

This bill provides only that the Sherman Act shall not render illegal such contracts when applied to intrastate transactions within jurisdictions where they are lawful, and where goods are sold within those jurisdictions under contracts lawful there, that transportation into such jurisdictions for sale therein shall not be rendered illegal by the Sherman Act. The only departure from the language of the State fair-trade acts resides in the words "or other conditions", line 9, page 1, which are inserted so that the producer of identified merchandise is not prohibited from requiring his retail distributors to sell only to consumers for use and in the drug trade to limit sales to proper drug outlets and similar reasonable limitations.

The language on page 2, line 6, "under any statute, law, or public policy" is designed to cover the States where there are no fair-trade acts but where, contracts fixing resale prices are valid under the public policy of these various States as declared by their highest courts.

Lines 9, 10, 11, 12, 13, and 14 of page 2 permit the making of such contracts with respect to intrastate transactions without danger of interference from the Federal Trade Commission. The Federal

Trade Commission, following the *Beech-Nut case*, holds that the making of such contracts, or the attempt to control resale prices by cooperative means, are unfair methods of competition.

In short, the purpose of this bill is merely to permit the States without Federal interference, to determine for themselves their own public policy with respect to contracts operative and enforceable only within their limits.

In conclusion, may I repeat that the State fair-trade acts do not embrace bulk commodities. They are limited to trade marked goods sold in free competition with other goods of the same class. Contracts between producers and between distributors are not allowed. There cannot be any horizontal contracts. They must be vertical from the manufacturer down, not among producers, or among wholesalers and producers.

Senator TYDINGS. Somebody not connected with the same operation?

Mr. ROGERS. Exactly.

Moreover, these acts do not fix any prices, or require that prices be fixed. They are permissive only. They allow a single producer, if he chooses to do so, to make contracts with the distributors of his goods, if they wish to enter into them with him, establishing on them minimum resale prices to the end that the producer may protect his distribution by insuring a living profit to his distributors. And finally, the bill before the committee does not attempt to establish any national policy but merely allows each State without interference, to establish its own.

I have prepared a brief memorandum citing the case in a little more detail, which I shall be glad if the committee will permit me to file.

Senator HATCH. It may be incorporated in and made a part of the record. I think the committee will be glad to have it.

(The document referred to is here printed in full, as follows:)

MEMORANDUM

The purpose of S. 3822, commonly referred to as the Tydings bill, is to afford Federal recognition of the so-called fair-trade acts of the various States and to enable producers and distributors to take advantage of their provisions without risk of violating the existing Federal laws with respect to unfair competition or restraint of trade in interstate commerce. The Tydings bill is merely permissive in effect. It does not extend the scope of the fair trade acts, nor does it require anyone to enter into the type of contracts outlined in them. Thus the question as to the desirability or advisability of adopting the Tydings bill resolves itself into the question as to the desirability of the various State acts.

The aim of the existing fair trade acts is to protect a producer or vendor against price-cutting by enabling him to stipulate to his vendee what the resale price of the goods shall be. The acts apply to identified merchandise sold under competitive conditions. The limitation to goods identified by a trade mark, label, brand, or producer's name is important, because unless the merchandise is so identified that the ultimate consumer may compare retail prices on identical goods, the evils of price-cutting do not arise.

The problem is to determine at what point, as a matter of public policy, the line should be drawn between price maintenance to be permitted as a legitimate and proper protection of the producer and the whole public, and price-fixing to be condemned as restraint of trade and interference with normal and fair competition.

THE HISTORICAL BACKGROUND

Almost since the beginning of commerce in its simplest form, the sale of goods from the producer directly to the user, there have been discussions of restraint of trade. At first each community was an isolated section, necessarily dependent on its own resources. Hence, for apparent economic reasons, the lawmakers and

courts disapproved any act or contract which interfered with a producer's means of livelihood on the one hand, or on the other hand unduly deprived the public in any manner of the products or skill which should have been available to it.[1]

With better roads and communication systems, commerce between the hitherto isolated communities began to develop and it was no longer necessary to guard the public so zealously against monopolies or excessive prices of their local producers. People and goods began to be available from other communities and the local producers were kept in check by the new competition. It began to be recognized that even a contract with a clause which laid some restraint upon trade might still be valid and acceptable "in cases where the special matter appears so as to make it a reasonable and useful contract." It was said that—

"In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, * * * and if upon them it appears to be a just and honest contract, it ought to be maintained."[2]

As time went by commerce and industry developed with more and more interchange between communities and geographical sections; but the English courts continued to consider the propriety of each contract brought before them on the basis of the special circumstances surrounding it. As late as 1894 a broader standard was adopted for the determination upon the facts of the reasonableness of a specific contract.[3]

It is notable that the leading cases in this country on the question of restraint of trade, through price maintenance and otherwise, have generally been decided upon legal technicalities without the court even having before it any real factual information from which the true effect on trade and the economic welfare of the public could be determined. Yet the public today has as much interest as the public of any earlier period in employment problems, the ability to buy quality merchandise, and the prevention of monopolistic control. It is possible that if our courts could have had before them the detailed information equivalent to that before the English courts as a matter of general knowledge in the earlier days, the restrictive decisions on price-maintenance cases would not have been rendered.

THE EARLY PRICE MAINTENANCE CASES

The earliest American cases which allowed resale price maintenance were patent cases. The theory behind them was that it was a part of the patentee's lawful monopoly to control (by proper procedure) the conditions of resale of his patented article by the distributor to the ultimate user.[4] Even after there had been decisions forbidding resale price maintenance contracts on other goods the new rulings were still thought to have no bearing upon the monopoly of a patentee and his consequent right to prescribe resale conditions.[5] This theory of the patentee's rights was upheld until 1917.[6] And even in 1918 Mr. Justice Brandeis urged, in a concurring opinion, that the right of a producer to fix resale prices was an economic question depending upon the relevant facts rather than any established legal principle.[7]

This right of a patentee to fix resale prices was extended and rpeatedly recognized and protected by the Federal courts upon the ground of direct analogy between the rights and monopolies of patent and trade secret articles.[8] But the rule as to trade secret articles was overthrown by a decision of Judge Lurton:[9]

"The mere fact that one article or class of articles is made under an unknown or private formula and another class is not, is an undeniable fact which may serve for some purposes to differentiate them. But that single fact does not afford an economic reason, and still less a legal reason for saying that it operates to exempt such articles from rules against unlawful restraint of trade."

This decision was followed shortly by, and was accepted by the Supreme Court in the first leading case on the subject of price maintenance—*Dr. Miles* v. *Parks* (220 U. S. 373).

---

[1] Oliphant, in Cases on Trade Regulation, discusses the early English statutes and cases.

[2] *Mitchel* v. *Reynolds*, 1 P. Wms. 181 (1711) quoted by Mr. Justice Hughes in *Miles* v. *Park*, 220 U. S. 373.

[3] *Nordenfeld* v. *Maxim*, A. C. 535 (1894).

[4] *Heaton Button Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288 (1896); *Henry* v. *Dick Co.*, 224 U. S. 1; *Bement* v. *Harrow*, 186 U. S. 70.

[5] *Edison* v. *Smith Mercantile Co.*, 188 Fed. 925; *Automatic Pencil Sharpener Co.* v. *Goldsmith*, 190 Fed. 205.

[6] *Motion Picture Patents* v. *Universal Film Co.*, 243 U. S. 502, which expressly overruled *Henry* v. *Dick*, *supra*.

[7] *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8.

[8] *Dr. Miles Medical Co.* v. *Goldthwaite*, 133 Fed. 794; *Same* v. *Jaynes*, 149 Fed. 838; *Same* v. *Platt*, 142 Fed. 606; *Wells & Richardson* v. *Abraham*, 146 Fed. 190; *Jayne* v. *Loder*, 149 Fed. 31; *In re Park*, 138 Fed. 21; *Hartman* v. *Platt*, 142 Fed. 606.

[9] *Park* v. *Hartman*, 153 Fed. 34 (C. C. A. 6).

The Miles *v.* Parks Case

Prior to this decision, producers had looked upon the use of resale price maintenance as their right. The most common device for effectuating it was by written contract with the distributor whereby he agreed not to resell the article below a stipulated price. The Miles Co. required every wholesaler and retailer selling its products to sign agreements to sell the goods at prices specified by the company. The defendant in this suit was a wholesaler who induced other wholesalers to sell to it at prices violating the agreement, and who in turn sold the goods to retailers at cut prices. The Supreme Court held that the contracts were void as a restraint on the alienation of title to property owned by the dealers, and as a restraint on competition, and for both reasons against the public interest. Mr. Justice Hughes held:

"The complainant having sold its products at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

It is important to observe, however, that this case was decided without proof or consideration of the economic factors which might have supported the plan. While the decision purported to rest upon protection of the public interest, no facts had been produced to show what was the actual effect of such a plan upon the public welfare.

Yet the Miles decision did not go so far as to condemn all contracts which act in restraint of trade. Indeed, it was expressly pointed out:

"To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise, restraints of trade are void against public policy."[10]

Neither in this nor in succeeding cases has resale price maintenance been held illegal per se. So, for instance, in *Federal Trade Commission* v. *Beech-Nut Packing Co.* (257 U. S. 441), though the Supreme Court enjoined certain specified practices of the Beech-Nut Co., it at the same time declared that the order of the Commission forbidding any form of price maintenance was too broad. In *Cream of Wheat Co.* v. *Federal Trade Commission* (14 Fed. (2d) 40, 48 (C. C. A. 8)), the court directed a proviso to the Commission's order to specify what the company might lawfully do to correct its resale price policy.

Wherever injunctions against resale price policies have been granted, they have been aimed at the methods that have been used to achieve the desired result, and the Supreme Court has not hesitated to approve resale price policies where the methods used were acceptable to it.

Methods Adopted Since the Miles Case

The result of the Miles decision was that producers began to cast about for new and legal methods of maintaining retail prices at the desired level. The first of these new methods which went before and was approved by the Supreme Court was that set forth in *U. S.* v. *Colgate & Co.* (250 U. S. 300). The manufacturer gave notice to the retailer that the goods were not to be sold below a "suggested" retail price, and supplemented this notice by a policy of refusing to sell to retailers who did not adhere to the suggested price. The Supreme Court held that no contract for price maintenance had been made; that a trader or manufacturer had a right to exercise his discretion as to the parties with whom he would deal; and that he might announce in advance the circumstances under which he would refuse t sell.

This ruling has been followed in subsequent cases, such as *Harriet Hubbard Ayer* v. *Federal Trade Commission* (15 Fed. (2d) 274) and *Shakespeare* v. *Federal Trade Commission* (15 Fed. (2d) 758).

Another method which has been pronounced legal by the Supreme Court is that adopted by the General Electric Co., very fully set out and discussed in *United States* v. *General Electric Co.* (272 U. S. 476). This company appointed retailer "agents" throughout the country, to whom the goods were shipped on consignment, title to remain in the manufacturer until sale at a specified price. The Court held (488):

"The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer."

---

[10] Citing and quoting *Gibbs* v. *Baltimore Gas Co.* (130 U. S. 409), and *Nordenfelt* v. *Maxim Nord* (1904 A. C. 565).

Thus there are two ways by which, with the full approval of the law and the courts, a producer may control the price at which his merchandise is sold to the public. Yet many manufacturers who would like to achieve that result are either unwilling or financially unable to adopt either of these methods. The refusal-to-sell policy is a precarious one, because if it is carried out to the extent of affording real protection against price-cutters, the manufacturer may find that through the very willingness of his distributors to cooperate with him a combination has developed which is an illegal restraint of trade.[11]

If the manufacturer wishes then to turn to the agency plan to control retail prices, he is faced with another, and in many instances an almost insuperable difficulty. He must deal directly with retailers under contracts which are necessarily involved if they are complete.[12] He must set up and carry the financial burden of a whole private system of distribution. He cannot avail himself of the established channels of distribution. But the average manufacturer cannot afford to set up a Nation-wide system of his own nor to carry it on with the requisite investment of capital, the additional burden of records and checking up, and the continuous close contact with his dealers which must follow the adoption of such a system.

Because of these difficulties and because in spite of them it has still been felt essential to devise some means of controlling resale prices, both manufacturers and distributors have turned to the idea and the hope embodied in the State fair-trade acts.

THE NECESSITY FOR RESALE PRICE MAINTENANCE

As competing channels of distribution developed with the increase of merchandising, competition between them became very keen. Price-cutting became the chief competitive weapon, and products under trade-marks or brands well-known to the consumer were obviously best adapted to the price-cutter's purpose. The greater "saving" he could offer the public on goods the standard value of which the public knew, the more likely was the price-cutter to get customers out of his competitors' stores and into his own. More often than not, his competitors retaliated and a price war was on.

(A) TO THE MANUFACTURER

The first economic effects of this system were felt by the manufacturers. The consumer market is the actual market of the producer, even though he may have parted with title to the physical goods before they reach the consumer. To retain his market and preserve his business and goodwill the producer must successfully solve several problems:

(1) He must have wide and well-established distribution, so that the consumer may be able to procure the goods when he wants them. But price-cut goods carry little or no profit for the retailer and hence little or no inducement to handle them.

(2) He must be assured of a reasonably even flow of distribution, so that he may be able to establish a normal course of business, may always have goods available to fill orders, yet not be left with too large a stock on his hands. But either price wars or steady price cutting disrupts the flow, because they tend to saturate the market and discourage retailers from handling the goods.

(3) He must be able to distribute his goods on such terms that the retailer can make a legitimate profit and not be tempted to substitute another brand of goods on which a greater profit can be realized.

(4) He must preserve his reputation as a manufacturer. When a cut price on goods prevails over a long period of time, the public does not stop to analyze the dealer's reason for it. It assumes that the dealer must still be making a profit, even at the low price. The manufacturer's reputation for fairness is damaged because it is thought he has fixed an excessive price at the outset.

(5) Above all, he must preserve the good reputation of his goods. A quality product, consistently sold at or below the price level of a cheap product, becomes in the minds of consumers a cheap product too, because they associate it with other products in the same price group. Thus they come to believe that the normal standard price for the product is excessive and more than the article is worth.

[11] As in *Toledo Pipe Threading Co.* v. *Federal Trade Commission* (11 Fed. (2d) 337).
[12] Consider the many ramifications of the contract in the *General Electric case, supra.*

It is apparent that either a cut-rate war or a long period of cut prices may be disastrous to a manufacturer. Either may disrupt the normal flow of his business, perhaps permanently cut off some of his avenues of distribution. His reputation and the reputation of his goods may be seriously damaged. His advertising is wasted because it becomes ineffective through lack of distribution or lack of public confidence. And he faces all this for no reason except that at the outset his reputation is good and his products are in demand, are of recognized value, and are known to be worth the normal price.

(B) TO THE WHOLESALER

In the earliest days of commerce it was generally possible for a retailer and often a consumer to deal directly with a manufacturer. Then a wholesaler was viewed with disfavor by the public as a "middleman" whose participation in commerce increased the cost of the goods to the consumer without serving any useful purpose. But as intersectional commerce spread it became increasingly difficult for even the retailer to deal directly with the manufacturer. Now the wholesaler fills an important and valuable place in the modern scheme of distribution. He often takes the responsibility of introducing a new product into a territory where the manufacturer might be unable to come through lack of capital. Even on well-known merchandise the wholesaler is of immense service to the producer and to the retailer on matters of credit and facility of distribution; and this service benefits the consumer too by making available the goods he desires to buy.

The wholesaler has become such an important link in the chain between the producer and the user of manufactured goods that his elimination would cause a serious disruption in distribution. He is most needed in interstate commerce, where the goods may have to be sent across the continent to reach their ultimate user. Yet this is the very place where the present state of the Federal law is forcing his elimination.

(C) TO THE RETAILER

Some of the present problems of the retailer are akin to those of the manufacturer. To preserve his trade he must carry in stock the well-known products that customers are likely to call for. He must be able to gage what his normal sale of those items will be, so that he need not turn away customers unsatisfied and still need not keep his capital tied up in an unnecessarily large stock of goods. He must preserve the goodwill of his business by a justifiable reputation of selling quality goods at a fair price.

The small retailer—as, for instance, the neighborhood druggist—is often the one who is most useful to consumers, through easy availability of goods and through actual services rendered in connection with them. He must, of course, have a fair margin of profit on his sales to carry his overhead and cover the services he renders. And he is the retailer who suffers most immediately and perhaps most disastrously from price cutting.

The small retailer has to face price-cutting competition from two classes of stores. The more legitimate is the group of chain stores or large department stores, which may by quantity buying be able to get the same goods on better terms and to pass part of the saving on to their customers. It is common practice, however, for such stores to choose well-known items—and the better known the merchandise, the more desirable for their purpose—to use as "loss leaders". The drastic cut below the standard price may be either temporary or permanent. It does not much matter because they hope to and do recoup the loss through added sales of other merchandise to the customers thus attracted to their stores.

The other consistent price cutters are the cut-rate stores, which are a fairly recent commercial development. They may have had their origin with dealers who did not know how to figure their costs and who honestly felt that they did not need the normal margin of profit on a particular article. The usual cut-rate store is not of this type. It uses the price-cut merchandise to attract customers to the store, and then derives its real profit, in one of two ways. The customer, deceived by the low price on the goods whose value he knows, may be persuaded to buy additional "bargain" merchandise on which the dealer's margin or profit is in fact excessive. Another method is to persuade the customer to buy in the place of the cut-price goods, unknown and inferior brands at about the same price level but on which again the dealer is able to make an excessive margin of profit.

These cut-rate stores provide very stiff competition for the average retailer. They usually have inexpensive quarters and equipment; they handle only fast-moving merchandise because they don't attempt to render complete service to

the public; and for volume of sales they depend upon price rather than upon continued goodwill of their customers.

It is generally conceded that the activities of price cutters lower the current sales price, and therefore the margin of profit, of every dealer in the vicinity. The public becomes familiar with the cut price and accepts it as a proper price for the goods. If a retailer does not meet the low price, he is thought to be making an excessive profit. If he does meet it, he sacrifices the profit he needs to sustain his business. If, because he cannot meet the price competition, he discontinues the sale of the goods, he risks the complete loss of his customers who will fill their other requirements at the place where they can buy the discontinued item.

(D) TO THE CONSUMER

A primary consideration on questions involving restraint of trade or fair competition has always been the ultimate effect upon the welfare of the community and of the individual consumers who make up the community. The interest of the individual consumer is to get merchandise of good quality at a fair price. The obvious premise is that if competition forces down prices of quality goods the consumer will benefit. But the known results of price cutting on trade require a deeper analysis of the effect upon the consumer.

Price cutting is a practice peculiar to urban centers. Consider the situation of the average urban resident. He lives in a residential section at some distance from the main business and shopping center. Somewhere in this center he may buy anything he desires, from a new automobile to a headache tablet. But the headache tablet he wants when he has a headache, not when he happens to be in the shopping district. He lives in more or less limited quarters with little storage space for supplies which he may not need for a long time. So he likes to buy his supplies when and as his need arises, not when and as he can make a special shopping trip.

From these circumstances arise the neighborhood stores to serve his convenience. Prompt service because they are near, comparatively easy establishment of credit because he is personally known, quick availability of emergency items outside of shopping hours—all these are the factors of convenience and necessity that make the local store indispensable. But the local store cannot survive unless it can draw enough business from the neighborhood on a fair margin of profit to support it.

What happens when a cut-rate store comes into the neighborhood? The consumer is attracted to the new store by the prices of familiar products far below the standard price his usual dealer has charged. He feels that he is making a big saving—so he makes other purchases at the new store, too. He buys unknown and inferior goods on the assumption that they are also bargains, and pays a price far in excess of their actual value. And while he is led away by the normal human love of a bargain, his old retailer is suffering from the loss of his business.

Eventually he wants something that the cut-rate store does not carry because it does not move fast enough, or wants some service that the cut-rate store will not give. Then he goes back to his old local dealer, but what does he find? Business has dropped off, so the retailer no longer carries the full stock in any line that he used to have. Some items have ceased to be profitable if he has to meet cut prices, so he no longer has them available at any price. Profits in general have decreased, so he can no longer render the service he used to give. The consumer finds himself cut off from any local source of supply and deprived of the easy accessibility which his living circumstances require. His cut-rate "savings" are swallowed up by the general injury to his comfort and welfare.

The Existing Fair Trade Acts

When these effects of price cutting began to be felt, there began immediately to be agitation for a remedy. The Miles decision cut off the most obvious plan, as affecting goods which passed in interstate commerce. The Colgate and General Electric plans were awkward, troublesome, and too expensive for the average manufacturer. Finally the States began to take an interest in the problem and to consider whether within the scope of their jurisdiction over intrastate commerce they could not find a remedy.

California was the first to take definite action. In 1931 it adopted a law which was amended in 1933 to strengthen its effectiveness. This California law has been used as a model for similar legislation elsewhere, and nine other States have adopted substantially identical laws: Illinois, Iowa, Maryland, New Jersey, New York, Oregon, Pennsylvania, Washington, and Wisconsin. It is notable that these nine States contain 40 percent of the population of the United States.

Though some of these laws vary slightly in their provisions, they all provide for contracts between the producer and the distributor of identified merchandise, wherein the distributor's resale price is definitely fixed. The distributor may in turn contract with retail dealers for resale at a specified price. Thus the producer may fix the final resale price to the consumer. Selling or advertising the merchandise at less than the fixed price is actionable by anyone injured thereby, whether or not the price cutter is a party to the resale contract.

However, such contracts may be made only with respect to goods which are in fair and open competition with other products of the same class made by others. And dealers in the same distribution group—as, for instance, two retailers—may not make resale price agreements with each other. Exceptions are made for resale at lower than contract prices in specified circumstances.

New Jersey has another unfair trade law which was first adopted in 1913 and amended to its present form in 1915. It permits a manufacturer to fix resale prices by affixing a specified form of notice to his goods. Violation of the terms of the notice is actionable by any injured party. It has been little used until now but it may present a practical alternative for contracts under the general type of fair-trade act.

In Connecticut the California type of fair-trade act failed to pass, but a retail drug control act was adopted in 1935. It provides that (with specified exceptions) no drug retailer shall sell goods at a price below the manufacturer's wholesale list price per dozen or per unit, and a violating retailer is subject to a fine of $500.

The Need for Supplemental Federal Legislation

Such State laws are an essential part of the legalization for control of resale prices, because most retail selling is purely intrastate and beyond the scope of Federal jurisdiction. On the other hand, State laws alone cannot dispose of the whole problem because interstate sales are within Federal jurisdiction. At present a manufacturer cannot safely make a resale price contract with respect to goods which must pass in interstate commerce to reach the place of resale.

It is thought that a manufacturer may properly bring himself within the scope of the State laws by incorporating a selling company in each State to receive and take title to the goods and then to make contracts respecting their resale within the State. This is expensive as to organization, operating costs, and taxation, and for covering a large number of States would be wholly impracticable. Some wholesalers have sought to offer an alternative by taking upon themselves the responsibility of making resale contracts with retailers, but this entails at least an implied agreement with the manufacturer and is open to question for that reason. The need for either arrangement would be obviated by the passage of S. 3822.

The Provisions of S. 3822

Contracts which are legal under the Fair Trade Acts of various States shall not be considered illegal under the Sherman Anti-Trust Act. The language used is that of the State Fair Trade Acts. S. 3822 is limited in its operation to States where these statutes are in force (with an addition to be mentioned later on) and provides only that the Sherman Act shall not render illegal such contracts when applied to intrastate transactions within jurisdictions where they are lawful, and where goods are sold within those jurisdictions under contracts lawful there, that transportation into such jurisdictions for sale therein shall not be rendered illegal by the Federal Antitrust Act. The only departure from the language of the State Fair Trade Acts resides in the words "or other conditions", line 9 page 1, which are inserted so that the producer of identified merchandise is not prohibited from requiring his retail distributors to sell only to consumers for use and in the drug trade to limit sales to proper drug outlets and similar reasonable limitations.

The language on page 2, line 6, "under any statute, law, or public policy" is designed to cover the States where there are no fair-trade acts but where, as in California, Iowa, Kentucky, Massachusetts, Montana, New York, and Washington, contracts fixing resale prices are valid under the public policy of these various States as declared by their highest courts.[13]

[13] California, *Grogan* v. *Chaffee* (156 Cal. 611, 105 Pac. 745; *Ghirardelli* v. *Hunsicker*, 164 Cal. 355, 128, Pac. 1041); Iowa, *Rawleigh Medical Co.* v. *Osborne* (177 Iowa 208, 158 N. W. 566); Kentucky, *Commonwealth* v. *Grinstead* (111 Ky. 203, 63 S. W. 427); Massachusetts, *Garst* v. *Harris* (177 Mass. 72, 58 N. E. 174); Montana, *Quinlivan* v. *Brown Oil Co.* (96 Mont. 147, 29 P. (2d) 374); New York, *Marsick* v. *Eastman Kodak Co.* (244 App. Div. 295, 279 N. Y. Supp. 140 (2d Dept. 1935)); Washington, *Fisher Flouring Mills* v. *Swanson* (76 Wash. 649, 137 Pac. 144). (These citations are taken from footnote 7 of Resale Price Maintenance Under State Statute (45 Yale Law Journal 672, 673.))

57070—36——3

Lines 9, 10, 11, 12, 13, and 14 of page 2 permit the making of such contracts with respect to intrastate transactions without danger of interference from the Federal Trade Commission. The Federal Trade Commission, following the *Beech-Nut case*, holds that the making of such contracts, or the attempt to control resale prices by cooperative means, are unfair methods of competition.

Conclusion

In short, the purpose of this bill is merely to permit the States, without Federal interference, to determine for themselves their public policy with respect to contracts operative and enforceable only within their own limits. It was hoped that the fair-trade acts would result in remedying some of the obvious evils of the present system and in needed protection for the producer, the distributor, and the public. The policy contemplated by them, however, has never had a fair trial because of the difficulties now involved in taking advantage of them.

The purpose and effect of the State fair-trade acts is not to fix or maintain prices on a high level. It is to enable a producer of trade-marked goods to protect his distribution by insuring a sustaining profit to his distributors, with consequent benefit to everyone. This purpose could be effectuated by the adoption of S. 3822.

Bibliography

General discussions

*Oliphant, Cases on Trade Regulation.

*N. R. A. Division of Review, Work Material No. 16, Resale Price Maintenance Legislation in the United States, by Harry S. Kantor with appendices by Anne Golden.

Resale Price Maintenance Under State Statute, 45 Yale Law Journal 672.

*Equitable Servitude on Chattels, by Z. Chaffee, Jr., 41 Harvard Law Review 982.

Haring, Retail Price Cutting (1935).

Miller, The Maintenance of Uniform Resale Prices, 63 U. of Pa. Law Review 22.

Legislation (1936) 36 Columbia Law Review 293.

Martin, The Fair Trade Act (1936), 5 Fordham Law Review 50.

Rogers, Predatory Price Cutting As Unfair Trade (1913), 27 Harvard Law Review 139.

Stevens, Resale Price Maintenance As Unfair Competition (1919), 19 Columbia Law Review 265.

Seligman and Love, Price Cutting and Price Maintenance (1932).

Terry, Price Standardization (1915).

Federal Trade Commission, Report on Retail Price Maintenance (1931).

Dunn, Junior Capper-Kelly Bills, 171 Printers Ink, 1935, 7, 84.

Brandeis, Cut Throat Prices—The Competition That Kills, Harper's Weekly, Nov. 15, 1913.

Brown, The Right To Refuse To Sell (1911), 25 Yale Law Journal 194.

Haney, Price Maintenance (1916) 6 Am. Econ. Rev. Supp. 185, 188.

Klaus, Sale, Agency, and Price Maintenance (1928) 28 Columbia Law Review 312, 441.

Murchison, Resale Price Maintenance (1922) 1 N. C. L. Rev. 36.

Schlicter, The Cream of Wheat Case (1916) 31 Pol. Sci. Q. 392.

Federal cases on resale price maintenance

Fowle v. *Park*, 131 U. S. 88 (1889).

Hartman v. *J. D. Park & Sons*, 145 Fed. 358, rev'd 153 Fed. 24.

Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U. S. 373.

In re Greene, 52 Fed. 104.

Dr. Miles Medical Co. v. *Platt*, 142 Fed. 606.

Dr. Miles Medical Co. v. *Jaynes*, 149 Fed. 838.

Dr. Miles Medical Co. v. *Goldthwaite*, 133 Fed. 794.

Central Lumber Co. v. *South Dakota*, 226 U. S. 157.

Tyson Bros. v. *Banton*, 273 U. S. 418, 429.

U. S. v. *Colgate Co.*, 250 U. S. 300.

Frey v. *Cudahy Packing Co.*, 256 U. S. 208.

*With the exception of items so indicated, the references in this bibliography have been compiled from the comprehensive annotations in the foot-notes to Resale Price Maintenance Under State Statute (45 Yale Law Journal, 672).

F. T. C. v. *Raymond-Bros. Clark Co.*, 263 U. S. 565.

Bitterman v. *Louisville & Nashville R. R. Co.*, 207 U. S. 205.

Authors & Newspapers Ass'n v. *O'Gorman*, 147 Fed. 616.

Adams v. *Tanner*, 244 U. S. 590.

Burns Baking Co. v. *Bryan*, 264 U. S. 504.

Nectow v. *Cambridge*, 277 U. S. 183.

Eubank v. *Richmond*, 226 U. S. 137.

Washington v. *Roberge*, 278 U. S. 116.

Shafer v. *Farmers Grain Co.*, 268 U. S. 189.

Swift & Co. v. *U. S.*, 196 U. S. 375.

Federal Trade Commission v. *Beech-Nut Packing Co.*, 257 U. S. 441.

Schechter Poultry Co. v. *U. S.*, 295 U. S. 495.

Ward Baking Co. v. *F. T. C.*, 264 Fed. 330.

Blumenstock Bros v. *Curtis Pub. Co.*, 252 U. S. 436.

**Heaton Button Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288.

**Henry* v. *Dick Co.*, 224 U. S. 1.

**Bement* v. *Harrow*, 186 U. S. 70.

**Edison* v. *Smith Mercantile Co.*, 188 Fed. 925.

**Automatic Pencil Sharpener Co.* v. *Goldsmith*, 190 Fed. 205.

**Motion Picture Patents* v. *Universal Film Co.*, 243 U. S. 502.

**Boston Store* v. *American Graphophone Co.*, 246 U. S. 8.

**Wells & Richardson* v. *Abraham*, 146 Fed. 190.

**Jayne* v. *Loder*, 149 Fed. 31.

**In re Park*, 138 Fed. 421.

**Hartman* v. *Platt*, 142 Fed. 606.

**Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 409.

**Cream of Wheat Co.* v. *F. T. C.*, 14 Fed. (2d) 40.

**Harriet Hubbard Ayer* v. *F. T. C.*, 15 Fed. (2d) 274.

**Shakespeare* v. *F. T. C.*, 15 Fed. (2d) 758.

**U. S.* v. *General Electric Co.*, 272 U. S. 476.

**Toledo Pipe Threading Co.* v. *F. T. C.*, 11 Fed. (2d) 337.

**Bauer & Cie.* v. *O'Donnell*, 229 U. S. 1.

**U. S.* v. *Schrader's Sons, Inc.*, 252 U. S. 85.

**Moir et al.* v. *F. T. C.*, 12 Fed. (2d) 22.

**Mills Bros.* v. *F. T. C.*, 9 Fed. (2d) 481.

Bobbs-Merrill v. *Straus*, 210 U. S. 339.

State cases on resale price maintenance

Grogan v. *Chaffee*, 156 Cal. 611, 105 Pac. 745.

Ghirardelli Co. v. *Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

Rawleigh Medical Co. v. *Osborne*, 177 Iowa 208, 158 N. W. 566.

Commonwealth v. *Grinstead*, 111 Ky. 203, 63 S. W. 427.

Garst v. *Harris*, 177 Mass. 72, 58 N. E. 174.

Quinlivan v. *Brown Oil Co.*, 96 Mont. 147, 29 P. (2d) 374.

Marsick v. *Eastman Kodak Co.*, 244 App. Div. 295, 279 N. Y. Supp. 140.

Fisher Flouring Mills v. *Swanson*, 76 Wash. 649, 137 Pac. 144.

Ingersoll & Bro. v. *Hahne*, 88 N. J. Eq. 222, 101 At. 1030 affd. 89 N. J. Eq. 332, 108 At. 128.

Singer Sewing Machine Co. v. *Lang*, 186 Wis. 530, 203 N. W. 399.

Weco Products Co. v. *Sunset Cut Rate Drug Co.*, Cal. Super. Ct. Jan. 24, 1934.

Doubleday, Doran & Co. v. *R. H. Macy & Co.*, 269 N. Y. 272.

Coty v. *Hearn*, N. Y. Law Journal, Nov. 26, 1935, at 2077.

Max Factor v. *Kunsman*, Cal. Super. Ct., Oct. 18, 1933.

Pyroil Sale Co. v. *The Pep Boys*, Cal. Super. Ct., July 10, 1934.

Cooper & Cooper v. *Angert*, N. Y. L. J. Nov. 2, 1935, at 1655.

General Cigar Co. v. *The Drug Market*, Cal. Super. Ct., Sept. 18, 1934.

Emerson Drug Co. v. *Weinstein*, Cal. Super. Ct.

Garst v. *Charles*, 187 Mass. 144, 72 N. E. 839.

**Walsh* v. *Dwight*, 40 App. Div. 513.

**Clark* v. *Frank*, 17 Mo. App. 602.

**New Century Mfg. Co.* v. *Scheurer*, 45 S. W. (2d) 560.

THE STATE FAIR TRADE ACTS

California Gen. Laws (Deering, 1931), Vol. III, Act. 8782, Secs. 1-5, amended by Cal. Gen. Laws (Deering Supp. 1933).
Illinois Rev. Stat (1935), c. 140, Secs. 8-11.
Iowa Sess. Laws 1935, c. 106, Secs. 1-6.
Maryland Sess. Laws 1935, c. 212, Secs. 106-9.
New Jersey Sess. Laws 1935, c. 58, Secs. 1-6.
New York Sess. Laws 1935, c. 976, Secs. 1-6.
Oregon Sess. Laws 1935, c. 295, Secs. 1-7.
Pennsylvania Sess. Laws 1935, No. 155, Secs. 1-6.
Washington Sess. Laws 1935, c. 177, Secs. 1-7.
Wisconsin Sess. Laws 1935, c. 52, Secs. 1-8.
Connecticut Gen. Stat. Ann., c. 135a, Sec. 962.

Senator TYDINGS. Mr. Chairman, I have had prepared a rather comprehensive lot of data, entitled "Predatory Price Cutting", which is well gotten up and full of valuable information. While it is a little voluminous, I would like to have it as a part of the record.

Senator HATCH. Is there any objection? If not, it may be regarded as an exhibit.

STATEMENT OF E. L. NEWCOMB, NEW YORK CITY, EXECUTIVE VICE PRESIDENT AND SECRETARY OF THE NATIONAL WHOLESALE DRUGGISTS ASSOCIATION

Senator TYDINGS. Mr. Chairman, our next witness is Dr. E. L. Newcomb of New York City, who is executive vice president and secretary of the National Wholesale Druggists Association.

Mr. NEWCOMB. Mr. Chairman, I am secretary of the National Wholesale Druggists Association, representing 213 wholesale druggists doing business throughout the United States, and 325 drug manufacturers. My remarks will be in behalf of our wholesale drug members.

Our association has unanimously endorsed the Tydings bill, S. 3822. We have done so because we have learned from our experience and contact with manufacturers and retailers who are endeavoring to operate under the respective fair-trade laws, that it is very difficult for them to successfully operate under those laws without some act of this kind. The difficulties, I think, are generally very well known. They are due largely to complications in the handling of the innumerable articles which are handled by wholesale and retail druggists.

There are over 200 nationally advertised brands of toothpaste, and many others which are marketed and sold. There are several hundred shaving creams. There are some 200 or more face powders. There is an innumerable number all the way down the line. It is just impossible for manufacturers and wholesalers and retailers under these fair-trade laws to operate successfully without some relief that will permit us to carry out the provisions of these State acts.

I would like an opportunity to file with you a list of our members and some statistical data relating to these problems in our distribution.

Senator HATCH. Do you have it with you?

Mr. NEWCOMB. I did not being it, but I will mail it.

Senator TYDINGS. Mail it to me, and I will hand it to the committee.

Mr. NEWCOMB. Very well.

Senator HATCH. Are there any questions? Who is next?

STATEMENT OF E. C. BROKMEYER, COUNSEL FOR THE FEDERAL WHOLESALE DRUGGISTS' ASSOCIATION

Senator TYDINGS. The next witness is Mr. E. C. Brokmeyer, of Washington, D. C., counsel for the Federal Wholesale Druggists' Association.

You may state your name and address.

Mr. BROKMEYER. My name is E. C. Brokmeyer, general counsel for Federal Wholesale Druggists' Association. My address is 991 Press Building, Washington, D. C.

I shall ask leave of the committee to file a brief.

Senator HATCH. That may be done. You do not care to make an additional statement at this time?

Mr. BROKMEYER. No statement.

(Following brief was later submitted:)

BRIEF ON BEHALF OF THE FEDERAL WHOLESALE DRUGGISTS' ASSOCIATION

WASHINGTON, D. C., *March 17, 1936*.

Hon. CARL A. HATCH,
Chairman, Subcommittee, Senate Judiciary Committee,
Washington, D. C.

MY DEAR MR. CHAIRMAN: The Federal Wholesale Druggists' Association, composed of 25 mutual and cooperative wholesale drug companies, located in various large cities throughout the country, and representing 16,000 retail druggists as stockholders and members, desires to be recorded in favor of S. 3822, the Tydings bill.

This association was organized more than 20 years ago for the purpose of enabling independent retail druggists to purchase their merchandise as cheaply as possible and thereby place them in a position better to compete with chain and department stores more favored in the purchase of their merchandise because of their greater buying power. Although our stockholders and members have been greatly benefited by the functioning of this association, they have not been afforded the protection against predatory price cutting necessary to save them from destruction in the field of competition now resorting to destructive methods of competition, the most notable of which is the sale of merchandise below cost as a trade incentive. The enactment of the Tydings bill, therefore, is necessary to permit producers engaged in interstate commerce to avail themselves of rights granted by State fair-trade laws.

Fair-trade laws have been enacted by 10 States within the past year and more are likely to be placed on the statute books when the legislatures meet. These laws permit the making of contracts between producers and distributors stipulating the minimum price at which the producer's product may be sold to the consuming public. To protect consumers against excessive prices the articles covered by the contracts must be competitive and furthermore they must be trade marked or bear a special brand. Articles may be sold at less than the contract price when damaged or deteriorated in quality, or in closing out the owner's stock for the purpose of discontinuing the commodity, or when sold by any officer acting under an order of the court.

The Tydings bill is merely an enabling act and can operate only where a State has enacted a fair-trade act. It amends the Sherman Act by relieving one engaged in interstate commerce from liability if he elects to make a contract under a State law stipulating the price below which his product cannot be sold to the public.

The Tydings bill conforms to the decision of the Supreme Court in the *Schecter case*, holding that the regulation of unfair competition in intrastate commerce is a matter for the States in the exercise of their police power.

Very respectfully yours,

L. E. SEIBERLICH, *President.*
R. E. LEE WILLIAMSON, *Secretary.*
E. C. BROKMEYER, *General Counsel.*

STATEMENT OF FRED J. GRIFFITHS, NEW YORK CITY, SECRETARY OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES

Senator TYDINGS. The next witness, Mr. Chairman, is Mr. Fred J. Griffiths, of New York City, who is secretary of the National Association of Chain Drug Stores.

Mr. GRIFFITHS. Mr. Chairman, my name is Fred J. Griffiths, and I am secretary of the National Association of Chain Drug Stores.

I want to say, speaking for the chain drug stores of the country, that they are all for this Tydings bill. We think the conditions in the industry are such that this State legislation has been necessary. The State legislation which was passed has been more or less inoperative, because of the lack of national legislation to back it up. The work that has been done in the States has already proven of benefit to the industry generally. While it is true that following these bills there was an increase in prices to the consumer, the general tendency was down rather than up. In order to stabilize conditions in the entire industry, it is very necessary to have some such legislation as the Tydings bill.

STATEMENT OF JOHN M. POHLHOUSE, BALTIMORE, MD., DIRECTOR OF THE NATIONAL RETAIL GROCERS' ASSOCIATION

Senator TYDINGS. The next witness is John M. Pohlhouse, of Baltimore. Mr. Pohlhouse is director of the National Retail Grocers' Association.

Mr. POHLHOUSE. Mr. Chairman and gentlemen of the committee, my name is John M. Pohlhouse, of Baltimore. I am a director of the National Retail Grocers' Association.

My remarks are going to be very brief. Our association is on record in favor of this bill 100 percent. We are very much interested in it and feel that it will cure many of the evils existing in our own business. So we ask the committee to do everything possible to give us a favorable report.

STATEMENT OF ROWLAND JONES, JR., WASHINGTON REPRESENTATIVE OF THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

Senator TYDINGS. The next witness is Mr. Rowland Jones of Washington, who represents the National Association of Retail Druggists.

Mr. JONES. Mr. Chairman, the National Association of Retail Druggists, an organization counting over 20,000 retail pharmacists in its membership and affiliated with thousands more through State and local groups, has long been on record in favor of the principles embodied in the State Fair Trade Acts. This position is a result of the many evils which have beset the profession of pharmacy for many years and which have been greatly accentuated during the past decade.

As a result of these evils, 10 States comprising over 40 percent of the population of the United States have approved Fair Trade Acts beginning with California in 1931 and which was followed by New York, Maryland, Pennsylvania, New Jersey, Iowa, Wisconsin, Illinois, Virginia, Washington, and Oregon. It is predicted that they will be approved by many additional States within the next year.

Other proponents of the measure now before this committee for consideration have covered the legal aspects of this bill.

I will content myself therefore with the single statement that adequate, efficient, and ethical pharmaceutical service, with all the public-health responsibilities of that service for the citizens of this country, is facing a problem which threatens the very existence of that service. We only ask here that the various States be permitted, by the provision of the Tydings bill now before you, to attempt to meet these problems in their own way, and in an effective manner without Federal interference.

STATEMENT OF R. L. SWAIN, BALTIMORE, MD.

Senator TYDINGS. Mr. Chairman, I will call Dr. R. L. Swain, who will speak for Mr. Sidney Hollander.

Mr. SWAIN. Mr. Chairman, I have a statement prepared by Mr. Hollander, which is intended to give the committee some information as to the critical situation which has developed in our industry. I only ask the committee's permission to read this brief statement. I ask you to bear in mind that this is a statement of a man engaged in the manufacture of drugs. [Reading:]

STATEMENT OF SIDNEY HOLLANDER

These brief remarks will be directed to the need for the change in present Federal laws proposed by the bill before you to simplify and clarify the distribution of merchandise across State lines. As a manufacturer of trade-marked items sold throughout the country, I urge that this bill receive your favorable consideration. I believe it will help solve some of the most perplexing problems that now face producers, wholesalers, and retailers alike.

Production, distribution, and sales are the three important factors with which every manufacturer must concern himself; of these, distribution is increasingly becoming the more difficult and complicated.

Without going too deeply into the matter, I wish to make brief reference to the growing difficulties faced by the small independent merchant throughout the land. Conditions over which he has no control have made it increasingly difficult for the honest retailer to compete successfully with other types of organizations, many of vast size, many unscrupulous in their methods, which are gradually but inexorably driving him out of business. In the special field in which we operate, drugs, we find conditions becoming steadily more alarming. In many cities I am assured by those who know that 50 percent or more of the independent retail druggists are now on a cash on delivery basis. Their purchasing power is limited to their cash resources of the day. The mortality of the stores in this group has assumed alarming proportions. More and more are being driven out of business. Their usefulness as distributors is being continually narrowed. Inevitably a continuance of present conditions will drive from our industrial life tens of thousands of these small merchants. Many there are who believe this carries grave dangers to both our economic life and our political structure, and that effective measures should be taken as promptly as possible to bring to them that measure of protection essential to the maintenance of their business existence.

Were these conditions due to natural economic processes, we might view them with some degree of complacency, as an expectable result of our accepted competitive system. But investigation shows that they are in large measure due to factors that by no stretch of charitable interpretation can be considered as legitimate competition. You are, of course, aware of many of the unsavory practices that are responsible for present conditions. Recent investigation by committees of Congress have brought some of these factors into the light and show the extent of practices beyond the self-protective abilities of any small merchant to combat. One of the favorite methods of getting rid of unwelcome competition in many retail fields is through displaying or advertising merchandise

below cost for a period sufficiently long to exhaust the financial resources of the smaller unit. Certainly this is no new practice; it goes back to an early date in our industrial history, and the results have always been considered undesirable. On its face, the selling of goods below cost might be tolerated as working to the advantage of the consumer, but usually one finds it coupled with attempts to deceive purchasers through the substitution of inferior merchandise. This practice is so common it needs no amplification. I need only remind you that no vendor could remain in business were his merchandise regularly sold at a loss, so the essential factor in this practice is the successful substitution of merchandise carrying a higher profit for that which is offered at a loss. The elaboration of the technique of substitution has been one of the most interesting phases of modern commercial life.

In some of the largest organizations, the remuneration of the sales-force is based directly upon their success in persuading customers to accept products other than those displayed or advertised. Sales of such loss-leaders are not only penalized but a failure to substitute other products carrying large mark-ups results in dismissal. Never should it be forgotten that the consumer is the principal loser in such a game, as he is inveigled into paying high prices for merchandise which is far too often inferior.

In an effort to meet these conditions and limit competition between merchants to an area of legitimate practices, numerous States have enacted fair trade acts or codes of fair-trade practices. This was intended not only for the protection of the merchant but for that of the consumer as well. The details of these acts I will not here discuss. Suffice it to say that the Federal Trade Commission has participated in and I think approved of a number of codes of fair-trade practices, insofar as they affect the interstate movement of merchandise. Most of them authorize and encourage contracts between producers, wholesalers, and retailers under certain specified conditions for specific purposes, the results of which were considered beneficial; but under existing conditions such beneficial results are only possible when all the parties to these contracts are residents of the same State. Merchandise produced outside the borders of such a State cannot be so protected under these laws, and as only a small percentage of items in any line are produced in the same State, it means that the greater proportion of the advantages that should accrue from such State laws are not obtained, and to that extent the law fails of its purpose of protection. Federal laws stand guard at every border to forbid the consummation of that which is desirable by the States.

To elaborate, in Maryland we recently passed a fair-trade act and are now operating under it. As far as my own company is concerned, I think that about 90 percent of the retailers in the drug field have indicated a desire to cooperate with us to obtain a measure of protection. They have signed voluntarily the agreement we offered them covering the items of our manufacture. I say voluntarily, as no inducements were offered to have them enter into such agreements. Pennsylvania passed a similar law, but though the retailers there are equally desirous of cooperating with us and having us cooperate with them, we cannot effectively do so. The Federal law forbids us to cross their State line, so it is illegal for us to extend to Pennsylvania retailers the protection intended by their law, and they continue to be subjected to the vicious conditions it was aimed to curb. New Jersey merchants in turn are denied assistance from Pennsylvania producers and wholesalers, and those in New York are likewise separated from their New Jersey friends.

So it is all through the country. The State laws are frustrated by Federal barriers, and what is sound merchandising practice in one State becomes a Federal offense if consummated a few miles farther away. The situation is absurd. It largely nullifies the benefit which the retailers in each State so badly need and which the sentiment in their State attempted to provide. I cannot believe the existing Federal laws were conceived for any such purpose.

The bill you are now considering removes these artificial boundaries to commerce and permits a law abider in one State to remain a law abider in another. Concretely, all it will do is to permit interstate operations that conform to State fair-trade laws—nothing more. Where a State has passed no such law, obviously no such agreements to operate under it are possible. The present Federal prohibitions would still stand.

There are many precedents for such an action by Congress. Its authority to subordinate its own rights to those of the States were indicated in its laws affecting the movement of liquor in interstate commerce. Recently the same thing was done in the Hawes-Cooper bill, concerned with the movement of prison-made

goods from one State to another. In that very case the Supreme Court recently sustained the authority of Congress to adjust its laws on interstate trade to make them conform to the wishes of the States as indicated in their local laws. The passage of the bill you are now considering would be but one more evidence of the willingness of Congress to respect the rights and sentiments of the States in matters affecting their own citizens.

No manufacturer, wholesaler, or retailer will be compelled to change his present practices under this permission. They would merely be permitted to do so if they so wished. Its sole effect would be to withhold penalties for the observance of State laws by those outside its borders.

The sentiment throughout the country for the protection of the small merchants and consumers from unscrupulous and unfair-trade practices is growing rapidly. Last year a dozen States passed fair-trade acts; this year there will be many more, but no matter how many States desire to extend such protection to their citizens, their laws are doomed to ineffectiveness as long as Federal barriers stand in the way of their observance. The Tydings bill would correct that. It says that the Federal Government will not declare illegal the crossing of a State line for the purpose of conforming to State laws. It will help greatly to clarify distributive practices; it will improve the status of tens of thousands of small merchants who at this moment are desperately in need of the help their State wishes to afford them. I respectfully urge for it your favorable consideration.

STATEMENT OF JOHN J. CONNELLY

Senator TYDINGS. I will next call Mr. John J. Connelly.

Mr. CONNELLY. Mr. Chairman and gentlemen, I am sorry I received a copy of this bill only this morning, so I have not prepared a lengthy argument.

Senator TYDINGS. Would you like permission to file an argument?

Mr. CONNELLY. I would.

I am executive secretary of the National Institute of Manufacturers and distributors, with a membership of something over 1,500. I would like to endorse for our membership all the arguments I have heard here in favor of the bill, and urge the committee to grant favorable consideration.

I would like to point out one thing in connection with our industry, which is peculiarly subject to price-cutting and which perhaps as much or more than any other at the moment needs helpful legislation in order to stabilize itself and placed it on a proper plane of our social and economic life. I do feel that the bill before you is that type of legislation, and all of our members heartily endorse it and request its favorable consideration.

I would like to file a more complete argument.

Senator HATCH. You may have that privilege.

STATEMENT OF HON. MILLARD E. TYDINGS, A SENATOR FROM THE STATE OF MARYLAND

Senator TYDINGS. I understand we have 5 minutes left.

Senator HATCH. About that.

Senator TYDINGS. There are no other witnesses here, except Dr. Kelly, who will make a statement in rebuttal.

I would like to make a few brief observations.

First, I would like to point out that this bill does not authorize manufacturers to enter into agreements with other manufacturers to control the fixing of prices to their customers. It deals only with the right of a manufacturer to keep track of his article until it reaches the public, in order to guard the public against excessive prices on

the one hand and protect the manufacturer and distributor against cutthroat price-cutting on the other. There is no agreement providing for or permitting the creation of a monopoly.

Let me also point out that what this bill seeks to do for the small business man is already a privilege which the powerful can enjoy. For example, all automobile agencies in the country selling General Motors or Ford cars sell at the prices designated by the manufacturers, because the distributors are in most cases the agents of the manufacturers. Therefore, he can do legally by contract what the man not so fortunately circumstanced cannot do, because the latter does not have the power through aggregation of capital to set up agencies, but has to sell to distributors willy-nilly. So that if you extend the privilege contained in this bill to the extent that the bill defines it, you will be doing nothing more than extending to the small manufacturer a privilege enjoyed for many years by the most powerful concerns in the United States.

I think it is pretty generally understood that Ingersoll watches sell for a dollar. If a man wants to sell one for 50 cents, the manufacturer can take the agency away from him, because they are listed as agents, as I understand it. So that all you would be doing with this bill would be to put all business on the same plane. Certainly, if Mr. Ford and General Motors can fix the prices at which their cars shall be sold, assuming it is a reasonable price—and I believe it is, because automobile prices in general have a downward tendency all over the country—you are simply extending that privilege to the less fortunate manufacturer.

This bill does not provide for horizontal agreements between manufacturers. It must be a vertical agreement down to the consumer.

I also want to point out that there is no provision in this bill which fixes definitely the price at which an article is to be sold to the consumer. All it does is to provide that the manufacturer and the retailer may enter into agreements that the retailer shall not sell at less than cost and make it up on something else and thus destroy in the public mind the psychological benefit of the belief that the article is standard and worth something. When you cheapen an article to a price less than actual cost the public begins to believe there is something wrong with it.

Senator McGill. The price proposed to be fixed is a minimum price?

Senator Tydings. That is all.

Senator McGill. There is no standard by which that minimum price is to be fixed?

Senator Tydings. That is true, but, Senator, let me point out that there are over 100 different kinds of shaving cream. Let us say you are making one of them, and in your contract fix a minimum price so high to the distributor that he must sell it at a price above that charged by his competitors, the other 99 manufacturers will immediately knock down your contract and take your business away. The competition still exists. There is no right of manufacturers to combine. What happens under this bill, however, is that the manufacturer of an article does not have its prestige ruined by its being sold so cheap that the public lose the standard of value which is ordinarily associated with it. Competition always exists between one manufacturer and another. There is no horizontal agreement.

The last thing I would like to point out is that this bill cannot be unfair to the public, because if prices are set too high by any manufacturer, competition will take his trade away from him. It cannot be unfair to the retailer, because all retailers will stand on the same bottom. They can sell above the minimum, but they cannot go below it. It cannot be unfair to the manufacturer, because the element of competition is always present, and it should be obvious that no concern does business long by selling at less than cost. Less than cost selling rarely results in a saving to the public.

This bill does not transgress the spirit of the Sherman antitrust law or the Federal Trade Act. There is no restraint of trade. The competition still exists. If this bill would allow manufacturers to combine, or allow retailers to combine and fix the prices, that would be one thing, but the element of competition is never lost, never out of the provisions of this bill. Manufacturers still compete with each other. Retailers still compete with each other. Competition remains—and it is fair competition to the manufacturer, the retailer, and the public. I cannot see, therefore, where it would be unfair to the consumer, because it only fixes the minimum price, which we will assume should be above cost, and if it goes higher competition will bring it down. It likewise cannot be unfair to the retailer or manufacturer.

Senator Hatch. Senator Tydings, your time is up.

Senator Tydings. I wanted to leave those thoughts for the record. We will rest. I understood we have 15 minutes in rebuttal.

Senator Hatch. I would suggest, if there be no objection, that the letter from the Federal Trade Commission be incorporated in the record.

Senator McGill. I think it should be.

Senator Hatch. It is so ordered.

(The document referred to is here set forth in full, as follows:)

Federal Trade Commission,
Washington, March 2, 1936.

The Honorable Carl A. Hatch,
United States Senate, Washington, D. C.

My Dear Senator: I beg to acknowledge receipt of your letter of February 26, 1936, enclosing copy of Senate bill 3822, now being considered by a subcommittee, of which you are chairman, of the Senate Judiciary Committee. You state that your subcommittee would like to have the views of the Commission as to the provisions of this bill, and would also like to have the Commission's views as to the possible effect of this bill on section 5 of the Clayton Act, especially as to any tendency to control prices, etc.

Inasmuch as the bill provides that the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914, which refers to section 5 of the Federal Trade Commission Act, I assume that you desire the Commission's views as to the possible effect of this bill on section 5 of the Federal Trade Commission Act, with respect to any tendency to control prices, etc.

The maintenance of resale prices by a manufacturer on goods sold in interstate commerce, by contracts, agreements, or understandings, is now illegal under section 5 of the Federal Trade Commission Act and the Sherman law. The principle, as expressed by the courts, is that the policy of the Sherman law and the Federal Trade Commission Act, as those laws now stand, is not satisfied by competition between retailers of different manufacturers' products, but that there must be competition between retailers with respect to the articles of a single manufacturer. The decisions of the courts, however, go no further than to hold that contracts, agreements or equivalent cooperative methods designed to maintain prices at fixed levels and bearing no relation to the individual retail costs

among dealers, are unlawful. The courts have not held that a policy or scheme designed to prevent price cutting below cost is unlawful.

If one retailer has a selling cost which enables him to make a reasonable return at 30 percent gross profit and another has a selling cost which requires a 40 percent gross profit, a contract or scheme arrived at, keeping the price on a 40 percent level for both is, by court decisions, illegal where the sales by the manufacturer to dealers are in interstate commerce. The court decisions have not held that a manufacturer could not try to prevent the 30 percent store from wiping out the margin entirely by sales below cost.

S. 3822 legalizes "contracts or agreements prescribing minimum prices or other conditions for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer of such commodity and which is in free and open competition with commodities of the same general class produced by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is made, or to which the commodity is to be transported following such resale * * *."

Therefore, the effect of this bill under section 5 of the Federal Trade Commission Act and the Sherman law would be to legalize the control of resale prices, which, under the present laws, is prohibited.

Yours very truly,

CHARLES H. MARCH, *Chairman.*

Senator HATCH. I have received a telegram which I will ask Senator Austin to read into the record.

Senator AUSTIN (reading):

EAST ORANGE, N. J., *March 12, 1936.*

Senator CARL A. HATCH,
Chairman, Judiciary Subcommittee.

Greatly appreciate your kind invitation to testify at hearing before your committee on 13th inst. in re bill 3822 and on others on similar subject scheduled for hearings next week. Regret owing to previous engagements cannot attend. However, kindly read into your records the following statement:

"We are heartily in favor of the enactment by Congress of all bills having for their purpose the elimination, suppression, and prevention of all unfair practices and methods of competition in all various lines of business and industry. Especially all destructive, demoralizing, and unethical competitive practices of price discrimination now used by unfair competitors, monopolies, and a great many large corporations. The secret payment of money, goods, or otherwise through special rebates, refunds, commissions, credits, unearned discounts, or excessive allowances secretly extended to certain purchasers but for the purpose of influencing sales by certain large concerns through these false and deceptive means should be outlawed and severe penalties fixed for violations. Unethical price discrimination practiced these many years has resulted in oppression and elimination of a vast number of small and medium-sized merchants and manufacturers and has helped to bring about unwholesome working conditions, unreasonable long hours of employment, payment of inadequate and less than living wages, and has affected the public welfare and undermined the American standards of living in every section of the country. Proper limitations and curbs should be placed on all methods of price-fixing discrimination and rigidly enforced in all trades and industries. We are fighting for equal rights for the average small independent businessman. He should not be at a disadvantage in the conduct of his legitimate business. The National Association of Small Businessmen is pledged to support all such legislation as proposed in the various bills now before you for hearing. We have organized for the purpose of bringing small and independent business and industry into own organization for its own protection. We regard the passage by Congress of the above measure as vitally important to the interests and the general welfare of the American people.

"HARRY BERGER,
Executive Secretary."

I do not know of what he is executive secretary.

Senator HATCH. I do not know. I asked that the telegram be read in order that the opposition might hear it and know everything that has gone into the record.

Under a previous order of the committee it was decided that the first 45 minutes should be allotted to the proponents of the bill. Following that an hour would be allotted to those who oppose it, and the proponents would have 15 minutes in rebuttal. We have several requests to be heard from those who oppose the bill. In the order in which the requests were made, the committee will hear Mr. Fox, Mr. Walker, and Mr. Hall. I understand from the clerk of the committee that these gentlemen do not want their time limited. However, they have just an hour, and it occurs to me that, inasmuch as there are three witnesses, they should be allotted 20 minutes each, unless they can agree on a different schedule.

Mr. HAROLD E. YOUNG. Mr. Chairman, I understand that Mr. Hall, representing the American Farm Bureau Federation, desires but 10 minutes. I would suggest that the remainder of the time be divided between Mr. Fox and Mr. Walker.

Senator HATCH. Mr. Fox, you may proceed. Fifty minutes will be divided between Mr. Fox and Mr. Walker. I will call you at the end of 25 minutes.

STATEMENT OF IRVING C. FOX, GENERAL COUNSEL FOR THE NATIONAL RETAIL DRYGOODS ASSOCIATION

Mr. FOX. Mr. Chairman, my name is Irving C. Fox, general counsel of the National Retail Drygoods Association, representing 5,600 member stores, department stores, and shops in every State in the Union. I am just a simple lawyer who has devoted probably more time to the problems of retailing than any other lawyer in the United States, I think, although I cannot designate after my name all of the representations that follow the name of the principal witness for the proponents of the bill.

This is not a new thing, and you gentlemen are probably familiar with all the arguments that have been advanced here and may be advanced by us. This is the ghost of the old Capper-Kelly bill with a new shroud. The Capper-Kelly bill attempted to fix the principle of resale price maintenance in a direct manner. The Congress of the United States time and time again said "No." There has been nothing in our economic progress since that time that should cause the Congress to change its mind. This bill seeks by indirection to accomplish that which the Capper-Kelly bill sought to accomplish directly.

The statement has been made that 12 States have passed these laws, and that all this bill does is to aid the States in carrying out those laws. Statements were made as to the nature of those laws. This bill does not refer to those State laws that have been passed, and I do not believe any witness here is competent to state what those laws contain. So that all that is being asked of the Congress at the present time is to write a blank check to permit in interstate commerce that which is now forbidden through acts of which the Congress has and can have have no knowledge. Nobody knows what these laws are to be, in the various States.

No statement has been made of the number of States which rejected this price-fixing principle, and they far outnumber the States which have passed such laws.

Senator MCGILL. Do you have the number?

Mr. Fox. Seventeen up to the first of this year.

Senator McGILL. Do you know what States they are?

Mr. Fox. I have a list which I will file during the day. New York passed such a law which was recently declared unconstitutional.

Now, the statement made in good faith by Senator Tydings that only minimum prices are to be fixed is a statement which in practice is absolutely meaningless, because the minimum prices which have been fixed and will always be fixed are the actual retail sale price at which the manufacturer is desirous of having the merchandise sold. The minimum price may or may not mean anything. We do not know what that is going to be.

Gentlemen, this may be a vicious analysis, but what they are asking you to do is this: Suppose any State in the Union, or several States, legalize white slavery, and some of them come here and ask this committee to amend the Mann Act permitting that. They would not have the temerity to do it. Yet the present bill asks something that for the general public is just as disdavantageous.

Of course, as usual, it is the retail druggists and the wholesale druggists who desire this law. We are sympathetic with the business and problems of this industry, and always have been. The chain druggists come in and recommend this law. The lion is lying down with the lamb, and the lamb had better look to his chops.

Why do they ask that this law be passed? They have established themselves in the best locations in the various cities that they desire. If you go into any Peoples drug store in Washington, just what do you see displayed with the most prominence? The label of their own private brands. They will show you the advertised brands at certain prices, and will show you their own brands of equal merit at very much lower prices. Do they want this law because it maintains the higher prices of the advertised brands and so permits the development of their private brands?

Now, the economic factors of this law will be gone into more thoroughly by Mr. Walker, who is a well-known economist who has given much time and study to this bill. I would like to make a brief comment on the matter of cutthroat competition. That is not the only competition in business. Cutthroat competition does exist and always will, under this bill or any other law. Take a very simple illustration:

The "Colonel's lady and Judy O'Grady" are listening over the radio, and they hear the statement that a certain brand of cold cream will make them both as beautiful as a woman can hope to be. The colonel's lady deals with a store that gives her all types of expensive service, such as a charge account, delivery, telephone orders, and every convenience that she may want. She is willing to pay a certain price in order to get those conveniences. But Judy O'Grady is not in the same situation. Our American standard of living has reached a point where everybody does attempt to utilize beauty accessories, cosmetics, and so on, and the ones they think are the best are those that are advertised. So Judy O'Grady has the opportunity of going down to a store that does not deliver, does not take telephone orders, does not give every service that will make for greater convenience; but which minimizes the price for those people who can not afford to pay for the service that other stores give. Under this bill she would not have that advantage.

The United States Supreme Court, aside from the Congress of the United States, which has time and time again refused to pass these bills, has time and time again passed on the legal aspects of such legislation, particularly in the cases of *Miles* v. *Park* (220 U. S. 373), and *Federal Trade Commission* v. *Beech-Nut Co.*, to which I will refer more in detail in the statement I desire to file. There are many other cases. I will not take your time to cite all of them. These cases indicate the attitude of the court, not only in interpreting the present act, but in what the public is entitled to with respect to competition. In the recent legislation it is quite true that the Government has in a measure assisted the States, but it has been practically solely in legislation which has some social or public aspect, not in matters of this kind that are simply matters of private contract.

The Court of Appeals of the State of New York, in sustaining the New York Milk Control Act, reported in 262 New York 259, finds the resale price of the milk a matter of public necessity, as it undoubtedly is, which is quite different from cold cream, perfumery, and other cosmetics. The United States Supreme Court upheld that. The Supreme Court of New York declared resale fixing of prices to be unconstitutional in *Doubleday, Doran & Co.* v. *R. H. Macy & Co.* It did so after full consideration of the entire aspect, economic as well as legal. In my statement I expect to file I will cite decisions of the Supreme Court of the United States indicating that in the opinion of the Supreme Court such minimum price-fixing acts were in fact all illegal.

Senator AUSTIN. Do you not understand that it is to meet exactly those decisions that this bill is proposed, and that if this bill should be enacted into law the courts could not, and probably would not, hold those State acts unconstitutional?

Mr. Fox. No, Senator; because of the due process clause, and because of the Sherman Act, the courts have not taken that into contemplation in most cases. They have interpreted the Sherman Act.

Senator TYDINGS. May I interrupt your for a moment?

Mr. Fox. Surely.

Senator TYDINGS. Suppose Congress should entirely repeal the Sherman Act and declare a changed policy, this act would be constitutional.

Mr. Fox. Unquestionably.

Senator TYDINGS. Suppose that Congress had not defined any interstate policy, this act would not be declared unconstitutional.

Mr. Fox. I believe so.

Senator TYDINGS. On what ground?

Mr. Fox. On the ground that property rights would be violated; that a man owning property should not be restricted in his right to dispose of it as he may see fit.

Senator TYDINGS. What would be the penalty if there were no act of Congress?

Mr. Fox. If there were no act of Congress there would be no law.

Senator TYDINGS. If Congress were to repeal that act, there would be no policy and no way of enforcement.

Mr. Fox. No. A man buying property could sell it at any price he desired.

Senator TYDINGS. Congress always has the right, if it thinks it wise, to change the existing policy. The question is: Do we want to amend that policy, and, if so, how much?

Mr. FOX. If we want to amend that policy the Congress would take into consideration the constitutional rights of the owners of property.

Senator TYDINGS. Certainly.

Mr. FOX. The decisions then would have to be based on a different premise than those under the antitrust law.

Senator TYDINGS. I am sorry I interrupted you.

Mr. FOX. It is quite all right.

It seems to me the proponents of this measure are asking that the Congress pass a law which is nothing more nor less than a blank-check which would have for its purpose legalizing any law which any State may enact, without having any knowledge in advance as to what the law may be. We see no reason for discrimination, which would result from this bill, in that the Congress of the United States would impose on those citizens of the States which did enact these price-fixing laws conditions which are not applicable to citizens of the United States with equal rights in States which have not passed these laws. In other words, the citizen of California must pay 59 cents for a tube of shaving cream, which the citizen of a neighboring State may purchase for 49 cents. After all, the Congress of the United States represents the entire people of the United States and not the people of any individual State.

STATEMENT OF Q. FORREST WALKER, REPRESENTING R. H. MACY & CO., INC., OF NEW YORK

Mr. WALKER. Mr. Chairman, my name is Q. Forrest Walker. I am economist for R. H. Macy & Co., Inc., of New York.

Senator AUSTIN. Mr. Chairman, I am obliged to leave for a short period at 11:30. I do not want the gentleman to think it is in reaction to his remarks when I step out.

Mr. WALKER. Not at all.

Senator HATCH. Are you the gentleman about whom Senator Wagner spoke to me?

Mr. WALKER. That is right.

Senator HATCH. Very well. You may proceed.

Mr. WALKER. The subject for discussion before your committee so profundly affects the whole problem of distribution that it can hardly be covered adequately in the very limited time placed at the disposal of the witness. When a similar measure, S. 97, was before the Senate Committee on Interstate Commerce, I had the pleasure of presenting a statement in opposition, and it took about 4 or 5 hours to present a full statement with proper authorities. All I can do in this limited time is to touch upon a few high spots.

Senator AUSTIN. Are those remarks in connection with that bill still in print?

Mr. WALKER. They are unfortunately out of print. I believe it would be helpful if the testimony could be reprinted. It has been out of print for some time.

Now, this bill is nothing more nor less than a plain price-fixing measure. It has always been the position of our company that we would oppose resale price fixing, because it is good business for us to oppose all types of legislation which are in effect raids upon the family pocketbook. We believe resale price fixing threatens the independence of the merchant, and aims to make him a vending machine for the manufacturer rather than a community purchasing agent. We believe that it freezes prices at uniform levels, and that we can make no progress toward cheaper and better methods of distribution by selling smaller quantities at high fixed prices.

I shall not take the time to review the various State laws in effect, nor to emphasize the very rigid provisions that we find in them, particularly the provision in section 2 of these laws which makes the contract binding upon third parties when there is no privity of contract. Nor shall I discuss in great detail other provisions which I think are quite dangerous. I shall not take the time to discuss the technical defects of this bill. I want to come down to the broad general economic proposition that we have here under discussion.

I do not believe, sir, that this bill can be considered solely on the narrow technical grounds of facilitating the operation of State laws. The question must be argued on its merits, because this bill proposes a sweeping change in our basic laws. The real issue is the merit of a vast system of unregulated private price fixing in interstate and intrastate commerce.

This bill sanctions monopoly and monopolistic practices. It removes all competition in price through the various stages of distribution, from manufacturer to wholesaler, to jobber, to retailer. At the present time marketing costs absorb about one-half of the consumer's dollar, and this part of the final price will no longer be determined by the free play of competitive forces. Unlike our patent and copyright monopolies, the price-fixing monopoly is granted in perpetuity.

Many advertised brands are so firmly established that they have acquired monopolistic characteristics. I need name only a few. Cream of Wheat, Quaker Oats, Coca-Cola, Ivory Soap, White Rock, Wamsutta Percales, and many others. Competition between advertised brands does not protect the distributor because it is impossible to conduct a successful retail business without stocking the well-known brands. The merchant is compelled to put in a stock of these brands or he cannot run his business. In some lines a mere handful of advertised brands preempts the entire retail market.

I have listened with interest to the statement that this bill applies only when the particular commodities are in "free and open competition with other commodities of the same general class." There is not a single line in this bill, nor in any one of the State bills, that provides any public agency to determine when the article is "in free and open competition." We in the merchandising business know that there are many articles which are not in free and open competition.

I believe this bill jeopardizes the independence of the retailer, and in that respect is essentially monopolistic, because his profit margins are placed entirely in the hands of the manufacturer. True it is that the fixed price is supposed to be a minimum price, but practically it is the final retail price. Experience shows that when the brand becomes thoroughly entrenched the retailer's margins are squeezed. The manufacturer under this proposed legislation would be permitted to enter into contracts with his wholesale distributors, jobbers, and retailers and control the margin of each factor in the distribution of that particular commodity.

57070—36——5

Under this bill the manufacturer is really granted effective control over distributive channels in which he has made no financial investment, and assumed no financial risk of profit or loss. It is all very well for the Senator from Maryland to talk about agencies. I appreciate that point of view. But the fact remains that in bona fide agencies the manufacturer assumes the essential risks of distribution.

Senator TYDINGS. Is that true with respect to the automobile line?

Mr. WALKER. In most cases, except possibly under certain consignment contracts.

Senator TYDINGS. I think you will find in most instances that the dealers are required to take so many cars, whether they can sell them or not, the price being fixed by the manufacturer, and the dealers find themselves in many instances broke at the end of the year.

Mr. WALKER. There may be some qualifications I am not aware of, but generally speaking under a true agency the manufacturer assumes full distributing risks.

I want to point also that under retail operations as conducted today in the United States the cost of selling an article is, unfortunately or fortunately, not uniform, and all uniform prices for resale are, therefore, definitely uneconomical. The average operating expenses of distributors vary widely. I cannot take the time in this limited presentation to give detailed figures of the variation in operating expenses for differing types of retail business. The fact remains that all surveys, including United States census surveys, show that operating expenses vary widely. It follows that to fix uniform selling prices where operating expenses vary so widely is not a safe thing from an economic point of view.

We know that there are differences in the operating methods of retailers, such as the cash-and-carry method, the cash-and-delivery method, and the credit-and-delivery method. We know there are differences in the quality of service rendered. We know there are differences in economic locations of retail establishments. We know that these particular articles are sold by numerous types of retail outlets with widely varying costs. We know these costs are related to retail sales volume. We know there are differences in stock turnover, and very great differences in managerial ability. We know, furthermore, that the fixed, variable, and joint costs vary from establishment to establishment; and that there is no way of ascertaining the exact cost of selling a particular item under the existing system.

You have heard much about the drugstore trade. I present here [indicating] a simple chart to show you something about distribution in the drug business. It was compiled by the United States Department of Commerce. Please note that packaged medicines were only 12.2 percent of the drug business; that 26.1 percent is fountain business; 18.8 percent tobacco business; 16.1 percent prescription, and so on. Every one of these drugstores you have heard so much about is in exactly the same position as department stores and many other merchants. Unfortunately, I do not have the time at my disposal to amplify this argument.

The relief provisions in this law cannot make prices sufficiently flexible to meet the needs of the distributor. The relief provisions do not recognize variable economic costs in distribution, although the manufacturer is left free to operate on the basis of such costs, in fact,

on the basis of any cost he sees fit to operate on. For instance, under the relief provisions of these State laws, which would be sanctioned under this law, sales to meet urgent needs for cash, such as pay roll, taxes, payment of bank loans, and so on, would be impossible; sales to correct mistakes of excessive purchases would be impossible; sales to prevent mark-down losses on style and other merchandise would be impossible; sales to anticipate wholesale price declines would be impossible; and likewise, sales made for the purpose of stimulating business would be impossible.

I believe the fixed uniform price penalizes the efficient merchant. He is not free to seek trade upon the basis which his opertaing costs may justify. Fixed prices are invariably set to satisfy the higher cost groups and there is no opportunity for the low-cost operator to gain by offering the lower prices which his efficiency may make possible. Fixed resale prices retard progress toward cheaper and more efficient distribution.

I should like to point out that resale price fixing imposes unwarranted burdens upon the consuming public. The purpose of these State laws and this particular bill is to raise prices and make things cost the public more than they do now. There is no provision in these State laws, with the single exception of Wisconsin, for any agency to determine the reasonableness of the fixed prices. The public is afforded absolutely no protection against the aggressions of monopolistic interests. If competition between distributors does not regulate prices in the public interest, the worst possible substitute is to vest price-fixing power without public regulation in the hands of manufacturers. If, as alleged, the public is deceived by cut prices incident to sporadic retail competition, then it follows that it can be easily mulcted by high prices fixed by the manufacturer without governmental regulation. Our experience shows that branded merchandise responds very slowly to declining raw material and labor costs, and when these costs are rising package content is reduced to maintain the fixed price.

This bill is unlimited in its scope, for these contracts may be used to fix the price of everything the public eats, wears, drinks, or uses. The price of necessities as well as the luxuries of life may be fixed. We believe there is no social justice in a price-fixing system which compels the consumer to pay Fifth Avenue prices for Third Avenue services. The wastes in the existing distribution are notorious, but resale price fixing prevents competition between distributors to reduce these extravagant wastes. No public interest is served by compelling the retailer to sell less at higher prices. The result is a lower physical volume of consumption, reduced production, and increased unemployment.

I know there is a strong demand for this type of legislation, but it has been based on emotional appeal. It is a striking fact that after two decades of debate in numerous public hearings on this question, no proof has yet been presented of a trade evil of sufficient magnitude to justify price-fixing legislation. I cannot take the time to go into this further.

The whole theory of overcharging on unbranded items is based upon what seems to me to be absurd premises. Obviously, no retailer can wisely charge more for his merchandise than competition allows. All prices at retail are generally regulated by competition.

This "smoke screen" of complaint about sales below net invoice cost is ridiculous. The Federal Trade Commission found relatively few instances of such sales. After exhaustive investigation it came to the conclusion that resale price fixing was not warranted in this country.

The origin of the demand for this resale price fixing ought to be considered. Obviously, as the evidence of the many public hearings shows, the consumer does not want it, because it raises the cost of living. The farmer does not want it, because it increases the spread between the prices of agricultural products and manufactured products. Labor does not want it, because resale price fixing reduces labor's buying power. Since the time of Samuel Gompers, organized labor, represented by the American Federation of Labor, has consistently and unequivocally opposed the whole principle of resale price fixing. The most progressive retailers do not want resale price fixing because it threatens their independence. The truth is that the principal demand comes from the drug and cosmetic manufacturers. In earlier years this group functioned through a lobby organization known as the American Fair Trade League. In recent years they have operated through trade associations, such as the Drug Institute of America, now disbanded because of the danger of prosecution under antitrust laws, the National Association of Wholesale Druggists, and various retail drug associations. They have been chiefly responsible for the Nation-wide campaign for so-called fair-trade laws.

All State campaigns have been conducted similrly from the language of the bills sponsored to the propanganda, including the bus caravans of small dealers sent to the legislatures. It is common gossip that the National Association of Wholesale Druggists has collected a very substantial war chest to push this bill before the Congress. It has been noted in the drug magazines that the Pepsodent Co. is willing to contribute $25,000 for the campaign for this legislation. The National Association of Wholesale Druggists maintains an extensive staff of lawyers and lobbyists to push the legislation.

interest of manufacturer noted

The present bill is really not a bill to eliminate loss leaders, not a bill to protect the good will of the manufacturer, and not a bill to hamstring chain-store competition. The truth of the matter is that this bill is a bill to guarantee the profit margins of inefficient dealers in nationally advertised brands, particularly patent medicines, drugs and cosmetics, to the end that manufacturers of these products and allied interests may completely control their national markets and exact greater profits at the expense of the consuming public.

Let me revert for a moment to the question whether the goodwill of the manufacturer is destroyed when the price is cut. Let us consider this matter of goodwill. Every time my firm buys a nationally advertised article, we pay for whatever goodwill there may be in that name. We pay a substantial price for it. Every manufacturer who resorts to national advertising knows well in advance that his price includes an additional amount as a sort of insurance to protect him against the hazards of competitive distribution.

Let us take Aspirin Tablets. When we buy from the Bayer Co., they cost us 44 cents a hundred. We buy the same identical chemical product from another manufacturer which costs us 10.78 cents per hundred. There is a case where the manufacturer has protected his goodwill by a differential of 316 percent. Can anybody say that when we buy Bayer's Aspirin Tablets the manufacturer is not protected from the hazards of distribution? I don't think so.

Take bicabonate of soda. A certain branded article costs us 19.8 cents. We buy the same U. S. P. product from another manufacturer, without any brand name, and it costs us 8.2 cents. There is a differential of 141 percent. That seems to me to be ample to protect that manufacturer from the hazards of competitive distribution.

Here is another. Take lipsticks. We buy a nationally advertised brand that costs us 60 cents, and our own lipstick, which we believe is just as good as the other, because fundamentally they are all the same, costs us 23 cents. There is a differential of 161 percent to protect the manufacturer against the hazards of competitive distribution.

Here is a well-known hand lotion that costs us 61 cents when bought from a national advertiser. We make our own in our own laboratory and, with due allowance for manufacturing cost and profit, the cost to us is 22 cents. There is a differential of 196 percent to protect the goodwill of the national advertiser.

Here is another one, a very common household product, Parson's Ammonia. The manufacturer's price is 17.8 cents. Our own product, made according to recognized chemical standards, costs us 9 cents, as compared with 17.8 cents. So that manufacturer has a differential of 98 percent to protect his investment in advertising and goodwill. We think that is ample insurance for any manufacturer to exact for the goodwill that may be in his brand. We buy whatever goodwill may be in a brand name just as we buy the physical article itself. After we have bought both the goodwill and the article we believe we should be free to sell at our own price.

I could go on at great length and quote many authorities on this subject, including a number of well-known economists; but I must point out before I close my remarks that the main trouble in the retail trade is not due to price competition. Dun & Bradstreet's figures show that over the period 1923 to 1932 only 2.4 percent failed on account of competitive forces.

I have heard much about the retail store being crowded out of business through price cutting. We find in the census figures between 1929 and 1933 in the greatest depression in history that there was only a reduction of 1.5 percent in the number of retail stores. In 1929 there were 58,258 drug stores, and in 1933 there were 58,407 drug stores.

Senator McGill. Does that include chain stores?

Mr. Walker. It does.

Senator Hatch. You do not mean that those are the same proprietors, do you?

Mr. Walker. That is the number of drug stores. To carry my point a little further, the University of Illinois made an exhaustive study of mortality in retail business which showed that this branch of the retail trade had the lowest business mortality rate. That is amplified and supported by the studies of the University of Buffalo, and I believe, if my memory serves me right, the last survey of the Bureau of the Census shows substantially the same fact.

There is so much that can be said. Let me close with a brief statement from Prof. F. W. Taussig, one of our best-known economists,

whose name is familiar to the members of the committee. He made a study in 1916 of resale price maintenance. In 1932 he reaffirmed his earlier conclusion:

My conclusion is that the case in favor of price maintenance is not made out. There is no public gain from giving an article an outward appurtenance of special merit. There is still less a public gain from compelling retail dealings to be conducted in the good old way and at the good old expense. The price-fixing system would not indeed seem to be so dangerous as to call for penal treatment; it does not portend such large social and economic difficulties as the monopoly and trust. The common-law mode of dealing with contracts in restraint of trade suffices. Treat the arrangements as contracts of this kind, not criminal in their nature and not to be hounded down, but unenforceable in the courts. Let the retailer sell as he sees fit, and continue to trust in the efficacy of competition for cheapening the methods of distribution, and in the good sense of the purchasing public for assuring to them goods of the kind they really want, and at prices which are really advantageous.

That is taken from Price Maintenance, by Prof. F. W. Taussig, American Economic Review Supplement, volume VI, no. 1, March 1916, page 15.

I thank you very much for your kind indulgence, and wish I had more time to discuss this important subject.

EXTENSION OF THE REMARKS OF Q. FORREST WALKER, ECONOMIST FOR R. H. MACY & CO., INC.

The chairman has granted me permission to reply to the rebuttal arguments of the Senator from Maryland. Throughout this hearing we have repeatedly emphasized the difficulty of any adequate discussion of this vital distribution problem under the severe time limitations which the subcommittee has found necessary. This is most unfortunate, because this is a very dangerous price-fixing bill. There are similar limitations with respect to a rebuttal statement. For a fuller statement of the case against resale price fixing, reference should be made to my testimony on S. 97 before the Interstate Commerce Committee of the Senate, Seventy-second Congress, first session, part 2, pp. 128–173. It should also be noted that proponents have filed a special N. R. A. report entitled "Restriction of Retail Price Cutting with Emphasis upon the Drug Industry." This report has not been available to opponents and we are informed that only six copies have been prepared for distribution.

In my summary argument against this bill I have demonstrated that the retailer pays substantially more for the branded item than the indentical unbranded item; that this substantial excess payment is wholly adequate to cover any risks of loss of goodwill which the manufacturer may experience in competitive distribution; that it is, in fact, the payment which the retailer makes for the goodwill in the brand name; that after the retailer has bought the physical article as well as whatever goodwill may attach thereto, he should be free to sell the article at whatever price his costs and business judgment may indicate. We will pass over the fact that the retailer who stocks the advertised brand, promotes its sale by his own advertising, by word of mouth, and by appropriate display in his store is really the joint creator of the goodwill in the advertised brand. Goodwill is not the exclusive creation of the manufacturer. If the record clearly states his position, the Senator from Maryland apparently believes that there is some inconsistency in this argument on goodwill. I am unable to find such inconsistency.

If the Senator believes that proof of the existence of some competition between unbranded and branded merchandise impairs our general argument against the vicious and monopolistic character of this price fixing we do not believe his position to be well founded. There are literally hundreds of thousands of patented and copyrighted articles now identified by brand name or title wnich are protected under the law by grant of the exclusive right to reproduction. There are thousands of other articles not protected by patent or copyright, which dominate their respective fields and enjoy a monopolistic position by the sheer inability of competitors to impair a strongly advertised, ably merchandised, and long entrenched trade name. Under this bill these legal and de facto monopolies in production would be granted monopolistic control of distribution of their products.

The Senator fails completely to recognize that there are clear-cut economic distinctions between production and distribution. He ignores the fact that competition in distribution is just as important as competition in production. It is not sound public policy to demand competition in production and deny it in distribution. Monopoly is not less obnoxious to public interest when it is applied to the prices at which goods move through each stage of distribution to the ultimate consumer.

Even if we could be assured of some public agency, not provided in this bill nor in the State resale price-fixing laws, to determine when "free and open competition" between brand producers existed, the fact remains that such an agency would be engaged only in enforcing competition between producers. All competition in price between the distributors of the particular brand or brands would be abolished by resale price fixing. These costs of distribution now absorb half or more of the final retail price. Says Dr. Paul D. Converse, well-known authority on marketing problems, in his Elements of Marketing (Prentice-Hall, Inc., 1935), page 10:

"The total cost of marketing goods in the United States in 1929 may be estimated on the basis of the census data as $39,423,000,000 and the total cost of production as $36,169,000,000. These figures include values created by manufacturing, retailing, farming, wholesaling, construction, railroads, lumbering, mining, and fishing. They are not complete, since public utilities and most types of personal service are excluded. Nevertheless, the figures are large, accounting for a total value of $75,592,000,000. Marketing accounted for 52.2 percent of this total and production for 47.8 percent: thus marketing is more expensive than production. Of the money spent for goods by the household consumer, slightly more than one-half went to pay the costs of marketing, and slightly less than one-half to pay the costs of producing goods."

When distribution costs absorb half or more of the final retail price, it is not wise public policy to enact legislation which will remove all competition between distributors and vest control of the prices at which they buy and sell in the hands of the producers. In view of the Senator's other statements in the record, we are at a loss to reconcile his position on this bill with his well-known opposition to N. R. A. price fixing and other monopolistic practices encouraged by that legislation.

The whole system of price fixing proposed in this bill breeds monopoly. The real purposes are not obscured by the smoke screen, fanfare, and ballyhoo about so-called loss leaders. This legislation has been sought for many years by manufacturers who want complete monopoly of the distribution of their products. Through their wholesalers and in turn through retailers, they are the real motive power behind the drive for price fixing. Price-fixing power is seldom sought with the altruistic intent of protecting the small dealer and the consumer. In *U. S.* v. *Addyston Pipe & Steel Co.* (85 Fed. 281 ff.), the court said:

"But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there is nothing to justify or excuse the restraint, that it would necessarily have a tendency toward monopoly, and therefore would be void."

It would unduly amplify the record to quote economic and other authorities on the dangerous monopolistic features of price fixing in production and distribution. The fact remains that the consumer is never protected unless prices are set by the free action and interaction of competitive forces. This bill seeks to abolish them with respect to half of the meat, grocery, clothing, medicine, cosmetic, and sundry other expenditures of the American family.

In order to obscure their real intent, it has been a common practice for proponents of this legislation to allege that when some articles are sold at cut prices, or perhaps occasionally below cost, the merchant overcharges the public on his other wares. Persons unfamiliar with retailing are often impressed with these statements. They have been repeated again at this hearing. Space does not permit a full discussion of economics of retail pricing, but the argument may be fully and completely scotched by quoting from a book on resale price fixing which was financed by a drug manufacturer who has taken a leading part in the price-fixing controversy. I refer to Price Cutting and Price Maintenance by E. R. A. Seligman and R. A. Love (Harper Bros., 1932). From pages 242–243 we note the following:

"From the foregoing discussion, it appears that the current arguments on 'leader' merchandising have emphasized the consumer's loss through 'baiting.' To be sure a store depends for its profits on associated goods rather than 'leader' merchandise; but the facts which show the absence of uniform margins within

the store disclose little more than a pricing policy of universal application. Until there exists proof that prices on the remaining stock of goods exceed those of competitors on the same goods, we have little reason for claiming that the consumer loses as a result of his purchasing from stores that employ the latter policy.

"Moreover, the effectiveness of resale price maintenance in eliminating misleading advertisements and undesirable 'baiting' is doubtful. Since there would no doubt remain an ample number of unprotected articles available as 'leaders', the practice would in all probability continue and the existing evils would be unabated. This argument for resale price maintenance is accordingly not strong."

We repeat what we have so often said on this point. If the consumer is now deceived by cut prices and overcharged on other goods, he would be unconscionably mulcted under a system of unregulated private price fixing. We cannot safely abandon competition between distributors and rely upon the selfish interests of producers to fix fair and reasonable prices to the consumer.

Neither in our summary argument nor in this brief rebuttal statement is it possible to present detailed data on retail operating expenses. It would unduly burden the record to present the known facts from unimpeachable sources on the variations in retail operating expenses. It is sufficient to say that these costs show wide variation as between individual retailers in the same line, as between retailers in different lines selling the same items of merchandise, as between retailers in highly populated and sparsely populated sections, as between retailers using different methods of selling, etc. No two retailers selling the same item have the same costs. Fixed, variable, and joint expenses vary from establishment to establishment.

Since selling costs show infinite variation, the fixed uniform selling price is rank economic stupidity. Obviously, no manufacturer and contracting retailer have sufficient knowledge to set a retail price which is fair and reasonable to other retailers and to the consuming public when goods are sold under such diverse costs. It would be just as reasonable to make all manufacturers of a given article charge the same price on the theory that their individual costs are identical. If economic variation in costs is essentially characteristic of production, it is equally characteristic of distribution. If it is logical to permit the low-cost manufacturer to seek business by selling at lower prices than his competitors, we can find no logical basis for denying the same right to the distributor. As the Senator aptly says: "The matter of contract dealing with the necessities of life must be of public interest." It is. So much so that we cannot wisely permit the elimination of retail competition and entrust price making in distribution to the owners of advertised brands and labels who seek this power behind a smoke screen of talk about "loss leaders" which the Senator concedes to be a problem of relatively minor significance.

not the point

It is no defense to say that contracts sanctioned under this bill are wholly voluntary matters and that the retailer need not sign a price-fixing contract. With the exception of New York State where the provision has been invalidated, these State resale price-fixing laws make the prices fixed in a single contract binding on parties not privy to the contract. Such provisions violate fundamental legal principles; and it is doubtful if they can ultimately be sustained in our courts. Practically, in the absence of such a provision or in the event it is declared unconstitutional, the fact remains that many important brands are so well entrenched that the retailer cannot afford not to sign a contract, if such contracts are finally legalized in interstate commerce. He could not possibly operate a store without stocking large numbers of branded items on which the fixed price would be sought to be maintained.

The Senator from Maryland has argued that agency methods of price control are only available to corporations with large capital and that enactment of this measure to make possible price fixing by contract is necessary to remedy the deficiencies of capital in small corporations. Under bona-fide agency, the producer assumes all of the important risks of distribution and as a distributor he is entitled to fix his own selling prices. It is quite another thing to propose legislation to legalize contracts which will give the producer effective control of distribution channels in which he has invested no money and assumed no risk of profit or loss. This is a form of economic chiseling which, in the long run, can easily become very dangerous to the economic survival of the small dealer. It must not be forgotten that the merchant who has invested his capital in distribution facilities has property rights which are entitled to protection. There is no equity in a system of price-fixing contracts which effectively bars him from using those facilities as his business judgment may dictate. And we may add that it is impossible to reconcile the concept of ownership in the ordinary articles of everyday trade with restraints on their alienation.

If there is something wrong in the system of price control approved in the General Electric decision, if it creates social injustices within the power of the Congress to remedy, then an attempt should be made to make it illegal. Lack of capital with which to establish agencies is not a business infirmity which is properly remedied by the passage of legislation which places existing channels of distribution in economic jeopardy. In passing, we may say that agency is not always an unmixed business blessing. Its risks are so great that many manufacturers, large and small, prefer to avoid them.

We note briefly the argument that automobile prices are fixed by agency arrangements. Surely, the Senator must be aware that the so-called fixed price for automobiles is a fiction so far as the ultimate buyer is concerned. Used-car valuations vary from dealer to dealer and the list price is not a final fixed retail price in any practical sense. Perhaps only the buyer without a trade-in ever pays the list price, and there are many exceptions even in those cases.

Finally, we cannot fail to note the Senator's very proper concern for the small dealer. It is our carefully considered opinion, after long-study of distribution problems, that price fixing whether in the form proposed in this bill or otherwise, will never aid in solving the problems of the small dealer. It would not only deprive him of his independence, place his margins in the hands of the producer, and reduce him to economic vassalage, but it would crowd the field with so many other distributors of brands, that his survival would be seriously menaced. Too often he is simply the shield behind which special privilege seeks to get more firmly entrenched.

In all of these distribution controversies there is a tendency to overlook or perhaps wholly ignore the effects of proposed measures upon the family pocketbook. After all, there are some 120,000,000 consumers upon whom unregulated private price fixing would simply impose unwarranted and unnecessary burdens. Price fixing makes the abundant life more costly for the average man and woman. In this connection, the comment of the Federal Trade Commission in its Report on Resale Price Maintenance, part II, page 160, is particularly pertinent:

"The fact is that consumers live on different economic levels and have varying standards of living. To the housewife purchasing on the basis of $10,000 family income, fine store fixtures, roomy aisles, beautiful displays, courteous salespeople, credit and frequent and expensive delivery services may be worth the additional cost. To ask the wife of the day laborer to pay the price necessary to cover the additional cost on any goods that both families use may be asking her to pay for service which she cannot afford and which, therefore, she does not desire, because every cent saved in buying may mean ability to satisfy to some extent wants that otherwise would remain ungratified."

And the price fixing here proposed does just that.

STATEMENT OF HUGH F. HALL, ASSISTANT WASHINGTON REPRESENTATIVE OF THE AMERICAN FARM BUREAU FEDERATION

Mr. Hall. My name is Hugh F. Hall. I am the assistant to the Washington representative of the American Farm Bureau Federation.

The subject matter of this bill is a point that the American Farm Bureau Federation has had in mind for a decade, I guess. It is perhaps that long, or it may be longer ago when the Federation adopted a resolution opposing the principle of resale price maintenance. The Federation is opposed to it because it believes it is inherently unsound.

The situation with respect to the farmer and the effect upon him that would follow from this law is such as I think would result most necessarily in an increase in the disparity between the income and purchasing power and outgo on the part of the farm population. I might state that our membership is composed of some 300,000 members distributed over 37 States. The approximate number of people involved, I suppose, would be 1,200,000 or 1,500,000.

Agriculture sells by the same efforts and the same methods that Adam Smith analyzed in the sixteen hundreds. I think there are very few other lines of activity similarly situated.

Senator HATCH. I do not want to interrupt you, but you made the statement a moment ago that this bill would tend to increase the disparity between what the farmer sells and what he buys.

Mr. HALL. I think it would.

Senator HATCH. The only reason you could advance for that would be that this bill would have the effect of raising the price of what the farmer buys.

Mr. HALL. That is true.

Senator HATCH. That is your idea?

Mr. HALL. That is our conclusion.

This subject has been treated at some length in Senate Document No. 13, in the 74th Congress. I commend to the committee's attention the charts on page 2.

Senator HATCH. Senate Document No. 13?

Mr. HALL. Senate Document No. 13. I cite that because it seems to me it is especially informative in respect to this subject of price maintenance and price rigidity.

Another point that I think is interesting from the consumer's angle is illustrated by a remark I heard a man make the other day. In that particular household that man said he does the grocery buying. He has found that he has to shop at four groceries to get the best prices. If a policy such as is embodied in this bill were permitted, then a consumer would not have to go to four groceries. There would not be the same competition existing between those four. I don't think that is very wholesome. The consumer, while he does not have the ability to bargain that the retailer has, nor does the retailer have the ability to bargain that the jobber and others have, yet he does have some bargaining power, as evidenced by that illustration.

Senator TYDINGS. Will you permit an interruption? I do not want to consume your time. If you would rather I would not, I will not.

Mr. HALL. Go right ahead.

Senator TYDINGS. Your argument seems to be predicated on the statement that a bill of this kind will destroy competition and make for rigidity of prices. Take the case of canned corn or tomatoes or almost any other staple product. There are probably a thousand different brands of canned corn.

Mr. HALL. There may be. I am not informed.

Senator TYDINGS. If the prices get too high, would not the condition of competition force one manufacturer to sell as low as another?

Mr. HALL. Well, the tendency would be for each manufacturer to try to meet the prices of his competitors.

Senator TYDINGS. Suppose a manufacturer could not get his product into the grocery stores, would he not be tempted to cut his prices to the retailer and keep his product moving to the consumer?

Mr. HALL. He would.

Senator TYDINGS. Then it would not be fair to say as an absolute fact this bill would destroy all competition, would it?

Mr. HALL. Perhaps that is too strong a statement.

Senator TYDINGS. I do not want to consume your time. Just ring me off if I do. I assume your argument is that the manufacturer only would benefit from it?

Mr. HALL. Not altogether; but it does provide the manufacturer shall dictate the price at which the retailer shall sell.

Senator TYDINGS. Suppose they make it too high, would not another manufacturer come in and get the volume of business, like Macy does in New York?

Mr. HALL. I don't want to carry the argument too far.

Senator TYDINGS. You oppose it because apparently the manufacturers might combine?

Mr. HALL. I don't mean to imply that, but I do mean to state that a manufacturer would be able to dictate to a retailer the price at which a commodity should be sold. I don't think that would be good, so far as the farming population is concerned. Our products are merchandized along the auction line.

I think the point was made with respect to the merchandising of automobiles, and that the manufacturer very largely determines the price at which they shall be sold. I would like to call attention to the fact that I doubt whether that is a true state of agency. The manufacturer of automobiles shares the risk of his enterprise in each locality.

Senator TYDINGS. So does the manufacturer of any other article.

Mr. HALL. And while I don't know whether I state this correctly or not, I think something like 90 percent of the automobiles that are merchandised involve second-hand cars.

Senator TYDINGS. And the agent winds up holding the bag?

Mr. HALL. That may be true.

Senator TYDINGS. I have been in conference with about 200 of them in the last 60 days.

Mr. HALL. I think I have made my point.

Senator HATCH. Your reasons are based largely on the proposition that such bills tend to raise the price of articles to the consumer.

Mr. HALL. That is right.

Senator HATCH. What do you think of the argument advanced by Mr. Rogers that, when a consumer goes into a drugstore and buys a 50-cent tube of toothpaste for 39 cents, before he gets out he invariably buys a 15-cent toothbrush for 50 cents? You are familiar with that line of argument? Have you made any study along that line?

Mr. HALL. No; I have not made any study on that subject. I did not hear all of Mr. Rogers' statement. I am not an economist, and don't know anything about merchandising other than what I come in contact with as a consumer.

Senator McGILL. If the law would permit the fixing of minimum prices, those minimum prices would generally be the actual retail sale prices, would they not?

Mr. HALL. Yes. We think there is a harmful effect in the principle followed by this bill. As shown on page 8 of Senate Document 13, agricultural prices dropped 6 percent, whereas production dropped 80 percent; agricultural commodities dropped 63 percent in price, and production dropped 6 percent.

Senator McGILL. That was over what period?

Mr. HALL. From 1929 to the spring of 1932.

I have nothing further to say.

STATEMENT OF HON. MILLARD E. TYDINGS, A SENATOR FROM THE STATE OF MARYLAND—RESUMED

Senator TYDINGS. Mr. Chairman, it is not necessary for me to tell this committee that I have opposed all bills in Congress like the N. R. A. and A. A. A. and others, because I did not believe in the economics they contained. I think the argument made by the representative of Macy & Co. was a very good argument and economically is generally sound. However, it seems to me he did meet himself coming back. First, he says loss-leader selling is only about 1 percent of the total volume. Therefore, his argument that goods are sold at excessive cost must be predicated on the very figure of 99 percent of the sales which he himself offered, namely, that buyers buy 99 percent of their needs from concerns at higher prices than actual cost and sell 99 percent of them above cost. I do not just see where the conclusions are sound, because the illustration he uses, in my opinion, disproves his argument. We are dealing with loss-leader selling only.

If there is a small amount of loss-leader selling—and I do not believe it is large—then why are not prices raised now on the articles which are not loss-leader sales? Does not Macy sell them at attractive prices but at above cost to Macy. Why? Simply because there is the element of competition present. All of this argument in opposition to the bill is based upon the theory that the manufacturers will fix prices among themselves. He is no more permitted to do this under the pending bill than he is under the Sherman Act; that provision is not changed in the pending bill at all.

The manufacturer can follow his particular article through to the consumer as to minimum cost, and if he raises the price above the normal level his competitor comes in and takes his business away from him. That argument, in my opinion, has never been successfully met by anybody who has talked against the philosophy of this bill. If this bill permitted the manufacturers to combine among themselves and fix prices, I would be the last one to father it. This is not permitted. As I see it, the element of competition is never absent, but it does protect the manufacturer and the retailer, and does protect the consumer.

As far as the policy of Congress is concerned, it having passed the Sherman Antitrust Act and the Federal Trade Act, there is no reason why Congress could not change its whole policy if it wished to do so. There is no reason why that policy now expressed should be treated as the word of God or as a part of the Decalogue, if in the interest of fair play changes are found to be desirable.

I will concede there may be defects in the bill, and I would be the last one to say there cannot be any abuses arising under it. We are up against the question of whether we want to protect small business enterprises against powerful aggregations of capital. That is the fundamental question before this Congress. I am not out to destroy big business, but I believe it must be regulated. I believe it must be properly regulated in the interest of the small businessman and retailer, as well as the consumer, for not to regulate it so the small businessman can survive is to tend toward monopoly and no competition at all.

The statement was made that these matters are matters of private concern and not public. I refute that very strongly. The matter of contracts, dealing with the necessities of human life, must be of public concern.

I will say to the opponents of this bill, if we do not meet this problem now, in 5 or 10 years you will have to meet a more drastic solution of it. The day is going to come when this fight will be brought upon you 10 times as hard as it is now. We need large aggregations of capital as well as small businessmen. Each is a part of our economic life. But the small businessman is entitled to a reasonable amount of protection, and he must have it. If he does not survive the public is at the mercy of the larger concerns.

If there are 100 kinds of toothpaste and one manufacturer fixes a minimum price which is too high the other 99 manufacturers will take his business away from him.

Here is another angle for the committee to consider. We know there are many big business concerns that regulate their prices in interstate commerce. Take automobiles as an example. The manufacturers of automobiles fix the price at which consumers will buy them. If Congress will permit that in interstate commerce, then it must concede to the small businessman a comparable advantage, or it must eliminate the right of the large manufacturer to carry his price down to the consuming public. If the large automobile concerns may regulate their prices in interstate commerce because of their great financial ability to establish agencies, you must give the little businessman a comparable right, or he cannot stay in business.

It might be that only 1 or 2 percent have failed in business in the last 5 or 6 years, but who knows whether in the next 5 years it will be 20 or 30 percent. The sole purpose of this law is not to destroy competition, but to give the small businessman an equal chance to carry on, and unless you do that you gentlemen opposing the bill will rue the day you did it, because you are going to be confronted with more drastic regulation in the future.

Senator MCGILL. What is the purpose of the language in lines 9 and 10 on page 1 of the bill, "or other conditions for the resale of a commodity"?

Senator TYDINGS. There might be a condition when you must have a time limit. There are many goods that are perishable, many goods that may have gone out of style, and similar matters. The point was made by Macy & Co.'s representative that there should be some provision in the bill to meet trade conditions. I think that is a good point. There might come a time when, because of changes in style, a concern would be prevented from disposing of a large amount of product.

Senator HATCH. It is rather difficult to draw the line.

Senator TYDINGS. It is. I would rather have the Federal Trade Commission do that.

Mr. WALKER. Mr. Chairman, I would like to answer the Senator from Maryland, if I may be permitted to amplify my remarks in the record.

Senator HATCH. You will be given permission to do that.

STATEMENT OF E. F. KELLY, WASHINGTON, D. C., SECRETARY OF THE AMERICAN PHARMACEUTICAL ASSOCIATION

Senator TYDINGS. The next witness is Dr. E. F. Kelly of Washington.

Mr. KELLY. Mr. Chairman, I am secretary of the American Pharmaceutical Association, former secretary of the National Retail Drug Code Authority, and a member of the Maryland State Board of Health. In the very limited time that remains I would like to emphasize these facts:

The conditions which now so seriously affect retail distribution and which the measure under consideration is intended to relieve, are not of recent origin and are to a large extent the cumulative results of the long-continued practice of destructive price-cutting or loss-leader selling. These conditions have now reached the stage where they threaten the existence of the small retail business of the country and, therefore, raise an important social as well as economic problem. The interests of the manufacturer, producer, and wholesaler are directly involved and most important of all, the welfare of the consumer.

The situation may be set out in the following facts taken from the United States Census of Distribution and from other reports of the Department of Commerce.

In 1929, a year of prosperity, there were in the United States 481,891 stores engaged in selling foods having a total value of $10,837,421,000. Of these stores, 218,653 or 45 percent had total net sales of less than $10,000 with an average of $4,040. In 1933, a year of depression, the total number of food stores had decreased only 8,916, or 2½ percent, but the number with total net sales of less than $10,000 had increased to 294,724 or 65 percent of all food stores, and their annual sales volume had dropped to an average of $3,500.

In 1929, the food stores employed 725,407 part-time and full-time employees receiving an average annual wage of $1,061 per employee. In 1933, the number of employees had decreased to 682,985 and the average annual wage to $861 per employee.

In 1929, there were 58,258 retail drug stores in the United States, of which 10,383, or almost 20 percent, had total net sales of less than $10,000 with an average of $5,700 per store. In 1933, the number of drug stores was approximately the same but the number with total net sales of less than $10,000 had increased to 25,027, or about 43 percent of all drug stores, and their annual sales volume had dropped to an average of only $5,100 per store.

In 1929, the drug stores employed 179,000 part-time and full-time employees receiving an average of $1,260 per employee. In 1933, the number of employees had decreased to 154,425 and the average annual wage to $985 per employee.

A similar situation exists in the other divisions of retail distribution, as can be shown from the census reports.

The situation in all the branches of retailing is summarized in the following quotation from the 1933 report:

> More than 64 percent of all stores in 1933 did less than $10,000 of annual business and accounted in the aggregate for 13.85 percent of the total of retail sales. In contrast, nearly one-half of the business was done in 85,531 stores whose annual sales exceeded $50,000 each, although they constituted only 5.61 percent of the total number of stores.

This trend shows that the small retail distributors are rapidly approaching the time when they will be forced completely out of an independent business existence because it must be evident that they cannot make a reasonable living for themselves and their families and their employees on such small annual sales. Even if this situation were the outcome of fair methods of competition or of inefficiency in the conduct of business, it would still be deplorable in its effects on society as a whole. These small businesses have been and are the backbone of the communities of this country. It is of the greatest importance that they be given the opportunity to continue as self-supporting, independent business organizations and also that they not be completely removed from the field of competition.

If we ask ourselves, honestly whether we want this country to become a nation of clerks or to remain a nation of opportunity for individual enterprise, there can be only one answer consistent with American ideals.

It is well known that price-cutting is applicable to trade marked or otherwise identified articles to a greater extent than to unidentified articles, and that the proportion of identified articles has increased tremendously during the last 50 years especially in retail distribution. Through modern advertising methods, identified articles are made known to the public and are, therefore, more effectively employed as loss leaders. Price cutting has now become so extreme that it is injuring the retailer, the wholesaler, the manufacturer, and the public, because in the long run losses on loss leaders must be recouped by higher prices on other articles. The little business is unable, because of its smaller purchases, to meet the unfair competition thus brought about and the manufacturer is at the mercy of the destructive price cutter, since, without the legislation proposed, he cannot protect the property right he has built up in the articles bearing his trade-mark, brand or name.

As Mr. Justice Brandeis so well expressed it in 1913:

> A single prominent price cutter can ruin a market for both the producer and the regular retailer, and the loss to the retailer is serious. On the other hand, the consumer's gain from price cutting is only sporadic and temporary.

Because of the collapse of the N. R. A. codes of fair competition, students of the problem of retail price cutting believe that its solution now lies in some form of reasonable price control by the respective States. This approach is elastic and permits variations to meet local conditions. The experience gained thus far from price-control systems in operations shows that they can be so regulated as to bring about protection against price cutting without penalizing the consumer through higher aggregate prices.

It is fortunate that a study of price-control methods thus far employed in this country has just been completed by the Government. I refer to the report entitled "Restriction of Retail Price Cutting with Emphasis on the Drug Industry", issued by the Division of Review of the National Recovery Administration. I wish to file a copy of this report with the committee and to suggest that it be studied in the deliberations on this proposed bill.

This report covers the historical background of the movement to correct the evils of price cutting and loss leader selling from its inception to the present time; and provides a review of the legislation

proposed and enacted and the results of price-stabilization systems in operation. It also analyzes the court decisions on the subject.

I believe this report presents the following facts concerning the operation of the Retail Drug Code and the California fair trade law, which it discusses in great detail:

First. The report shows that the present drive for State fair-trade laws is fundamentally a movement of small independent retailers and not, as its opponents would have us believe, an effort of manufacturers to achieve a monopoly. A brief look at the facts must convince us that this is so. No manufacturer can operate under the fair-trade laws unless his product is in free and open competition with similar products; and this very competition prevents any manufacturer from arbitrarily raising his prices to the consumer. Any manufacturer who did so would lose his business to competing nationally advertised and private brands, especially the latter. Furthermore, there is absolutely no way under the law that competing manufacturers can enter into agreements to raise prices. The antitrust laws would prevent such an attempt, and the State fair-trade laws absolutely prohibit it.

Second. The report shows that under the Retail Drug Code prices to the consumer, in the aggregate, decreased. This result is wholly opposite to what the opponents of this code predicted, but it is easily explainable. Prior to the code, relatively few items were sold at deeply cut prices as loss leaders, and the vast majority of the 10,000 items handled by drug stores remained at a higher level. Price cutters needed only a few items to accomplish their purposes and to demoralize the businesses of small dealers. The code naturally raised the prices on these few loss leaders; but at the same time it had another important effect. Price cutters, deprived of the right to sell loss leaders below the code minimum price, sought to attract customers by selling a large number of standard articles at exactly the code minimum price; and, small dealers, previously afraid to engage in price cutting because of the depths to which it might lead them, began lowering their prices under the code on a wide range of products, secure in the knowledge that the practice could no longer go out of control. The net result was that far more prices went down than went up; and the consumer experienced, in the aggregate, a reduction of his drug and cosmetic costs.

Another factor in the reduction of prices to the consumer was a reduction of prices by a large number of manufacturers. At the hearing of the Senate Finance Committee on the continuation of N. R. A., in the spring of 1935, it was brought out that 100 drug and cosmetic manufacturers had reduced their entire scale of prices under the drug code, while only an insignificant number had raised their prices. There was good cause for this. Manufacturers whose products, prior to the code, had been sold as loss leaders found that the code raised their prices to the consumer. The result was consumer resistance and a shift of business from these products to competing brands with lower prices. To offset this, the manufacturer had no alternative but to reduce his price scale so that the code price of his product might go down to or below its former level.

The tendency under the California fair-trade law is much the same as the tendency under the code. The study referred to shows that consumer prices have not risen, in the aggregate, on account of the law.

Should the proposed bill now under consideration be passed, it would be most valuable to have this study, so ably begun by N. R. A. continued on a long-term basis in some Government agency, so that the future developments of the price-cutting problem and the future effects of laws on the subject may be under intelligent and continuous observation.

It is unfortunate that the N. R. A. study was completed too soon to include the recent decision of the Supreme Court of California upholding the constitutionality of the fair-trade act of that State, because both the majority and the minority opinions in that case furnish a masterly review of the fundamental questions involved in the effort reasonably to control severe price cutting. I should like, therefore, in closing, to submit to the committee a copy of that decision.

Senator HATCH. I think it would be well to put that in the record.

Senator McGILL. Has any State court held the acts of the States unconstitutional?

Senator TYDINGS. Do you want to answer that, Dr. Kelly?

Mr. KELLY. The fact is that in the *New York case* about 1½ percent of it was declared unconstitutional. The remainder of the act stands. It was not declared unconstitutional as a whole, and the opinion clearly states that the right of contract between the parties involved was legal.

Senator TYDINGS. We will put that decision in the record.

Senator HATCH. The time allotted for the hearing has expired. I want to express to all the witnesses the appreciation of the committee for the manner in which they have complied and confined their testimony to the limit set by the committee. We feel grateful for that.

I assume those interested know that on Wednesday and Thursday of next week we will continue hearings on several other bills of similar nature.

Mr. KELLY. May I insert a brief?

Senator HATCH. Yes.

Mr. YOUNG. Will other witnesses be allowed to prepare and file statements?

Senator HATCH. I think they should be given that privilege. It should be done within a week.

Mr. YOUNG. For the information of the committee, and because the 1932 hearings are not in print, it might be advantageous for the committee to arrange for the reprinting of those hearings, for the information that is contained in them.

Senator HATCH. The committee will discuss that.

BRIEF IN SUPPORT OF BILL S. 3822 SUBMITTED BY NATIONAL INSTITUTE OF WINE & SPIRIT DISTRIBUTORS, INC.

The distribution of alcoholic beverages is peculiarly susceptible to price wars not unlike those which have occurred in the sale of cigarettes, gasoline, etc. Once price cutting is engaged in to any great extent, stabilization becomes impossible of attainment, with the result that business becomes unprofitable for all, and bankruptcies, unemployment, and, in this industry particularly, drastic reductions in Federal and State revenue are direct results.

In this industry there is another direct result which renders the bad effects of price cutting doubly vicious and tends to hasten the inevitable resultant chaos. When price cutting occurs, producers logically argue that since distributors desire or can afford to sell at 5 or 6 percent off, then they (the producers) are inclined to take up the difference, either presenting it to the consumer or increasing their own profit margin.

In our industry many legitimate firms of high character and excellent reputation have had to discontinue their business because of price cutting among their competitors had rendered even a small profit impossible. The elimination of such firms from the industry is a distinct loss to those who remain, and the development of a sound industry is retarded.

The successful continuation of this industry is not only a social desire of the American people, it is a vital economic necessity. Perhaps no one other agency has made such a tremendous contribution to economic recovery. This is not guesswork. Factual statistics which give overwhelming proof are easily available. In 1933 taxes on liquor amounted to $43,000,000. In 1934 they amounted to $259,000,000; in 1935, $411,000,000, and it is expected that in 1936 they will exceed $503,000,000. In other words, reduced to understandable language, the direct cash contributions from the liquor industry to government covers the entire expenditures of the Army and Navy. Liquor taxes alone, then, assure this country of national defense.

From an employment standpoint, this industry has created approximately 1,000,000 jobs since the repeal of prohibition.

From a sociological viewpoint, it is unnecessary to point out the sincere efforts of the many legitimate and high-minded majority in the industry to raise it to the highest level and promote moderate and intelligent drinking, to the end that the industry should occupy its proper place in our social order. Federal, State, county, and local officials in charge of liquor enforcement have repeatedly and publicly stated these facts, which are borne out by all available statistics. No sane American citizen can be gullible enough to believe that when the legitimate business men in this industry are driven out through inability to make even a small margin of profit, we will have the return in great numbers of the gangster, racketeer, bootlegger, and speak-easy, so rife during prohibition.

There is only one answer to destructive price cutting. Stripped of all superfluous economic verbiage, it is "the ability to maintain resale prices."

This was clearly recognized during the code period, and with the collapse of N. R. A., some 12 States recognizing the evils of price cutting on standard brands, enacted fair trade laws permitting vertical price maintenance contracts. The first of these was enacted in California, and on February 28, the California Supreme Court upheld the validity of this act in the case of *Max Factor & Co.*, Los Angeles cosmetic manufacturer and *Sales Builders, Inc.* v. *Clarence G. Kunsman*, Los Angeles retail merchant. The opinion, written by Chief Justice William A. Waste, stated that the act and recently enacted amendments to it constitute a proper legislative declaration of policy with respect to the practice of price cutting. The opinion stated further: "It has not been shown the act is unreasonable or arbitrary. One price cut calls for another, and it is difficult to halt the practice." According to this decision in California, the distributor and retailer are both liable to legal action if they fail to live up to the price agreement set by the manufacturer, regardless of whether or not there is a signed contract in effect.

In New York State, the Trade Practice Act known as the Feld-Crawford law was recently tested in the appeals court, and while one section was declared unconstitutional, the sections which provide for vertical price maintenance agreements between individual producers and retailers still remain in full force and effect.

In all of the States where these laws have been enacted, they have been vigorously opposed by those department and chain stores who merchandise their products through the inducement of "loss leaders." Under this method of merchandising a nationally advertised product, for which a public demand and consciousness has been built up by the manufacturer after great expenses, is sold at or below cost as an inducement to the customer who is expected to purchase other merchandise upon which a profit (sometimes exorbitant) is made. This form of merchandising is not in the end of benefit to the consumer, and destroys the public psychology as to the quality of the merchandise.

This is one of the most vicious forms of price-cutting, and those who engage in it oppose these fair-trade practice laws by raising the hobgoblin of price-fixing, or the incorrect argument of consumer benefit.

The fair-trade laws are in no sense price-fixing, since they allow only vertical price maintenance, and wherever those would result in excessive prices, hundreds of other articles of the same type would immediately secure the consumer demand. In Governor Lehman's appraisal of the fair-trade law for New York State, he stated truly:

"The bill is in no sense a general price-fixing act. Under no condition does it authorize a contract or agreement between manufacturers and producers or between wholesalers or between retailers as to the sale or resale prices of any commodity. Nor does the bill prevent the resale of a commodity at any price where one is closing out his stock of goods for the purpose of discontinuing that line, or where the goods have been damaged or have deteriorated in quality and proper notice has been given to the public.

"In the first place, it is important to note that this bill applies only to commodities which are in fair and open competition with commodities of the same general class produced by others. If this essential factor is not applicable to a certain commodity, then the bill has no force or effect whatsoever with respect to it.

"Also of great importance, is the fact that the bill is merely permissive; it authorizes a manufacturer or producer to enter into contracts for the maintenance of his price, but it does not compel him to do so. The existence of this free choice and of this flexibility will preserve in full vigor the natural forces of competitive enterprise.

"This bill in no way sanctions monopoly, monopoly prices, or combinations in restraint of free competition between commodities. This is true because the provisions of the bill are applicable only to a commodity which is in fair and open competition with commodities of the same general class produced by others. The prices of commodities that are sold in fair and open competition with other commodities of the same general class will always be subject to control by the powerful forces of competition. If a manufacturer marks his product at a price which the consumer deems too high, the consumer will naturally purchase a commodity of the same type produced by another manufacturer who is willing and able to market at a lower price.

"The maintenance of the resale price of commodities that are in open competition is not novel. We have in our present economic life many instances of it; for example, automobiles, gasoline, newspapers, magazines, electrical products.

"Moreover, I believe this bill will protect the small independent merchant, retailer and businessman. It should offer some protection against devastating cutprice practices such as the ruthless method of lost leader articles. The bill will also serve to discourage falsification and adulteration of commodities."

Senate bill S. 3822 merely recognizes the public policy already advocated by the various State enactments and permits fair-trade contracts to be made between firms in two States, both of which have in effect a fair-trade act. In effect, it does nothing more than allow to small individual businessmen one of the privileges which has for years been enjoyed by large and highly capitalized units.

Our industry is in dire need of helpful legislation and it is to be hoped that the committee, in their wisdom, will recommend favorable action on the bill in question, thus making more properly effective legislation which the other States have found necessary to pass despite the same opposition which is being voiced in connection with this measure.

National Institute of Wine & Spirit Distributors, Inc.
Joseph H. Kraus, *President.*
Joseph A. Tapee, *Treasurer.*
Clarence P. Goldberg, *General Counsel.*
John J. Connolly, *Executive Secretary.*

National Retail Dry Goods Association,
New York, N. Y., March 16, 1936.

Committee on the Judiciary,
Senate of the United States, Washington, D. C.

Gentlemen: In filing my statement in re the Tydings bill, S. 3822, I neglected to enumerate the 17 States which I stated had considered resale-price maintenance legislation in 1935, but the attempts at enactment of which were unsuccessful. May I therefore list them as follows: (1) Alabama, (2) Arizona, (3) Colorado, (4) Indiana, (5) Michigan, (6) Minnesota, (7) Missouri, (8) Montana, (9) Nebraska, (10) Nevada, (11) Oklahoma, (12) South Dakota, (13) Tennessee, (14) Utah, (15) Wyoming.

You will note that there are now only 15 States since Connecticut, which had refused to enact a proposed law, afterward and before the close of the year did

enact a so-called loss-limitation law which is not strictly price maintenance but is a prohibition against selling drugs, etc., below cost price.

In the meantime, however, New York has declared its law unconstitutional so that there are still 16 States which refused to enact these laws or declared them to be illegal.

Very truly yours,

IRVING C. FOX, *General Counsel.*

P. S.—Have just received word that the Attorney General of Kentucky has stated that he believed the Kentucky resale price maintenance act to be illegal.

I. C. F.

STATEMENT BY IRVING C. FOX, GENERAL COUNSEL FOR THE NATIONAL RETAIL DRY GOODS ASSOCIATION

We have in this bill the ghost of the Capper-Kelley bill newly arisen from its grave, but in a new shroud. For many years attempts have been made to obtain through Congress the enactment of retail-price maintenance bills and all such attempts resulted in failure.

S. 3822 is an attempt to accomplish by an indirect method that which the Congress has consistently refused directly to approve in the past. In proposing legislation of this type it is quite apparent that very little thought is given to the consumer and the general public.

There are practices that all distributors condemn, but the attempt to secure them by legislation which in accomplishing one purpose will create evils a thousandfold greater than those sought to be eliminated is of questionable value.

Our organization has been opposed to retail-price maintenance legislation for the following general reasons:

1. It is against the interests of the general public and will raise the cost of living.
2. It will change the retailer from a buyer for the public into a mere selling agent for the manufacturer.
3. It will prevent the proper reduction of retail prices to keep pace with corresponding raw material costs and in buying power.
4. It will abolish free and open competition among retailers.
5. It will tend to put the efficient store organization on the same basis as the inefficient, the high-expense store on the same basis as the low.
6. It will tend to break down and destroy the initiative of American business.
7. It will compel those who, because they cannot afford to pay high prices, are perfectly willing to dispense with costly service to pay the same prices as those who insist upon every type of service, such as telephone orders, charge accounts, delivery service, and adequate selling force, etc.

The bill itself like all these bills speaks of "minimum prices", but it is a well-known fact that the price set as the "minimum price" is always the "maximum price." In other words, it is in practice the actual price at which the manufacturer determines the merchandise shall be sold, and the committee should not be deluded by the use of the words "minimum price."

The economic phases of resale-price maintenance have been stressed at length both at this hearing and at the many hearings on similar bills heretofore introduced. Let me give you just one homely illustration:

We have developed our standards of living in this country to the extent where practically everybody desires to buy and utilize certain merchandise regardless of either their social or financial standing. In other words, if "the Colonel's lady and Judy O'Grady" happen to listen in on the same radio broadcast, and they are convinced by the persuasiveness of the announcer that a certain cold cream will enhance or increase their beauty to an unrealized extent they may both be desirous of testing this advertised cream. The "Colonel's lady" deals with a store which provides her with every possible service to make her shopping comfortable, she telephones the store to send her a jar of cream—to charge it to her account and to deliver it to her home. "Judy O'Grady" on the other hand puts on her hat and coat whenever she finds the leisure to do so, goes down to a store which does not take telephone orders, has no charge accounts, does not deliver merchandise, and has limited sales service. Under the provisions of resale-price maintenance legislation she is compelled to pay exactly the same price as the "Colonel's lady" even though, because of its efficiency, because of its volume of business and because of its economic method of operation due to limited service, the store could well afford to sell the item at a lower price.

None of these State laws prevents a manufacturer from discriminating between customers in the matter of special packaging. Many of the producers of merchandise for which resale-price maintenance is demanded have a special package which they sell to 5-and-10-cent stores bearing the same nationally known trade name, and these manufacturers persistently refuse to sell these packages for resale at this price excepting to these certain chains of 5-and-10-cent stores, and there is nothing in the laws to prevent it.

Senator Tydings passed very lightly over the words in the bill which referred to "other conditions contained in the contracts." Since these "other conditions" are at present undisclosed in most instances, we fail to see how they can be declared to be of no importance.

One of our most emphatic objections to this law is based upon the fact that the Congress of the United States is virtually asked to sign a blank check and to declare as legal, laws which are not at present existent, because if enacted into law this act would suspend the operation of the Sherman Act in favor of any contract now or hereafter legalized by States and not only which fixed minimum prices but which fixed other conditions controlling the resale of a trade-marked commodity.

There has been no such change in our economic structure, since the enactment of the Sherman Act, which will justify the amendment proposed in this bill. The Supreme Court of the United States, in various cases, has indicated unmistakably that it considers any attempt at resale price maintenance as not only illegal under the present statutes, but injurious to the public interests.

Mr. Justice Hughes, in the case of *Dr. Miles Medicine Co.* v. *Park & Sons Co.* (220 U. S. 373), said:

"The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

As late as July 1, 1935, the Supreme Court refused to review a decision of the circuit court of appeals, second circuit, which court had unanimously affirmed an order of the Federal Trade Commission prohibiting a certain drug company from entering into resale-price agreements.

Here is a quotation from the findings of the Commission which was approved by the circuit court:

"The Commission concluded that the petitioner's practices were to the prejudice and injustice of the public."

These two cases are merely cited to indicate the opinion of the Supreme Court as to the effect on the public of price maintenance.

It is quite true that in some recent legislation of tremendous social importance and public interest there has been approved certain cooperation between the Federal Government and the States enacting certain legislation, but in no wise does this legislation seek to control or affect strictly private matters.

The Court of Appeals of the State of New York sustained the New York Milk Control Act in the case of *People* v. *Nebbia* (262 N. Y. 259), which fixed the resale price of milk, but recently declared unconstitutional a resale-price maintenance act which permits the manufacturer to fix resale prices. *Doubleday Doran & Co., Inc.*, v. *R. H. Macy & Co., Inc.*

There are several significant statements in the case of *People* v. *Nebbia.* While the Court held that because milk was essentially a public necessity minimum prices might be fixed. It likewise held that the power so to fix prices "may not be invoked when we are dealing with an ordinary business essentially private in nature."

In the same case in the Supreme Court of the United States, Mr. Justice Roberts said (291 U. S. 502):

"Under our form of government the use of property and making of contracts are normally matters of private and not public concern, the general rule is that both shall be free of governmental interference."

Eleven States have enacted resale price maintenance laws. In New York State the law was declared unconstitutional. In California it has recently been upheld. This type of legislation was introduced in 17 other States, but attempts to pass these bills were unsuccessful, and from this we are compelled to conclude that the voice of the consumer in the majority of the States was raised in protest.

In view of the foregoing, we see no justification whatever for the Congress of the United States to enact a law which legalizes the, as yet unknown, laws of States; which would be discriminatory in nature in that it would permit the imposition of a fixed resale price on the citizens of one State by manufacturers engaged in interstate commerce, and would not permit the imposition of fixed resale prices on the citizens of other States by these same manufacturers.

Furthermore, we can see absolutely no reason why the Congress of the United States should enact a law which aids and abets certain States and certain manufacturers in fixing resale prices when the Congress of the United States has time and time again refused to enact such legislation affecting interstate commerce between all the States, and which the Supreme Court of the United States has so frequently indicated is legislation which is adverse to the public good and to the consuming public.

Respectfully submitted.

NATIONAL RETAIL DRY GOODS ASSOCIATION,
By IRVING C. FOX, *General Counsel.*

(Whereupon, at 12:15 p m., the hearing was concluded.)

SUBSEQUENT PAPERS AND STATEMENTS

I. STATEMENT OF MR. FELIX H. LEVY, A MEMBER OF THE BAR OF NEW YORK, WITH RELATION TO SENATE BILL 3822

1. This bill seeks to remove the illegality, existing by virtue of the Sherman antitrust law, of agreements for resale price maintenance.

It does so by proposing an amendment to section 1 of the Sherman law, whereby the following would be added to said section 1:

"*Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale at retail of a commodity which bears, or the label or container of which bears, the trade mark, brand, or the name of the producer or of the owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others, when contracts or agreements of that description but not related to trade or commerce among the several States or with foreign nations are lawful under any statute now or hereafter in effect in any State, Territory, or the District of Columbia, in which such resale at retail is to be made, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes', approved September 26, 1914."

2. By virtue of this amendment, if adopted, the construction first placed upon the Sherman law in the *Dr. Miles Medical Co. case* (1911), whereby the United States Supreme Court held, in substance, that agreements for resale price maintenance constituted a violation of the Sherman law, will be corrected and eliminated, but only within the limitations, hereinafter stated, declared in the proposed amendment.

3. These limitations are as follows:

(*a*) The proposed amendment expressly limits (p. 1, line 10; and p. 2, line 9) the removal of such agreements from the further operations of the Sherman law to transactions at retail.

I find it difficult to understand why such contracts affecting transactions at wholesale, are thus to be left within the existing prohibition of the Sherman law.

I believe it safe to assert that by far the larger proportion of transactions in business, wherein the force of the existing prohibition of the Sherman law against resale price maintenance is exerted, are transactions at wholesale, that is, transactions between manufacturers and their wholesale customers.

From my own professional practice in this subject, I can cite scores of examples where manufacturers of nationally-known commodities have found it necessary, both in their own interest and in the interest of their legitimate wholesale customers, to adopt measures, within lawful limits, for the protection of their commodities against price-cutters, by establishing a lawful system whereby the manufacturers' suggested resale prices will be maintained by their wholesale customers.

I attach some examples of the system thus lawfully pursued by manufacturers.

My conjecture is that the present proposed amendment is thus limited to transactions at retail, because of the widespread and just complaints which exist throughout the United States, on the part of the smaller and independent retailers against the serious damage done to them by the price-cutting activities of chain stores, mail-order houses, department stores and other like large retailers.

I fully sympathize with the objections and complaints which have been widely made through many years, by these smaller retailers; and I have discussed that phase of the subject in the attached article written by me and published in The Druggists Circular, January 1927. In such discussion, however, I did not aim

at limiting my argument against the evils of price-cutting, to the injuries caused thereby to retailers only, but sought to make my argument cover wholesalers as well.

I see no need for endeavoring to weigh or balance the injuries caused by price-cutting, to retailers and to wholesalers, respectively, because, in my opinion, great injury is done to each of these two classes of business, so that if a remedy is sought therefor, by suitable amendment of the Sherman law, such amendment ought not to be limited in its beneficial purpose, to retailers, but should apply to wholesalers as well.

(*b*) The proposed amendment limits its operation to contracts or agreements of resale price maintenance to commodities which are "in fair and open competition with commodities of the same general class produced by others."

I assume that the reason why this limitation is comprised within the proposed amendment, is in order to meet the many objections which were raised in Congress and in the public press, during the course of the debates in Congress on the Capper-Kelly bill—such objections being based upon the contention that unless such limitation were made, and contracts for resale price maintenance were legalized, the result might be the creation of a monopolistic position upon the part of a manufacturer (perhaps also, a wholesaler) who would avail himself of the privilege thus given, to establish a fixed resale price of his products.

An examination of the Capper-Kelly bill will reveal that not only was a limitation of this nature contained therein, but also a number of other limitations, whereby the proposed legalization of such contracts, was further limited and circumscribed in a number of detailed respects.

I was in constant and frequent contact with the late Representative Kelly, with relation to his bill and, although fully sympathetic therewith, frequently pointed out to him the unwisdom and superfluity of all of these limitations, including the one now under consideration, namely as to "fair and open competition." While I am unable to point out any objection to this particular limitation, upon strictly legal grounds, it seems to me to involve the risk often present in the drafting of proposed legislation, namely, that it is a superfluity and not of the essence, and, therefore, opens the door to difficulties of interpretation and especially, difficulties of proof as against an asserted violation of this new legislation.

I say superfluous, because throughout the period of many years in which I have been closely and professionally engaged in this subject, not only as the legal adviser of manufacturers and of wholesalers who sought the limited right given by existing law, to maintain suggested resale prices, and also as the legal adviser of many trade associations composed both of wholesalers and of retailers, respectively; and in addition in law articles and public addresses which I have delivered on this subject, I have never encountered a single instance where agreements or lawful systems of resale price maintenance, were ever, or could ever have been, utilized, or be capable of utilization, for the creation of a monopoly or of a tendency to monopoly. I mean by this that I know of no commodity concerning which any desire or purpose on the part of its owners, to create a monopoly, could be utilized, promoted or furthered in any way in the event that resale price maintenance agreements were removed from the existing prohibition of the Sherman law.

For example, if the commodity which is most frequently in mind when the subject of monopoly is under consideration, namely, oil, is selected for study, in its relation to the point now under consideration, I find it difficult to see how the proposed legalization of agreements of resale price maintenance, could strengthen, or in any way affect any purpose or power of monopoly, otherwise possessed by any leading oil company. Without laboring this phase of the matter too much, it seems to be evident that whatever aspects of monopoly are now possessed by the various oil companies, they would not be affected or enhanced by the right which would be given by this proposed amendment, whereby such companies could, respectively, enter into agreements with their customers to establish a minimum resale price. Firstly, if such minimum prices were fixed too high, they would probably be met competitively by lower prices named by other companies. Against this, it might be argued that once this right of establishing minimum resale prices were given, these oil companies would superadd to such right, secret agreements among themselves whereby uniform minimum resale prices would be established by such contracts and at high figures which might be oppressive to the consuming public. I believe that this constituted the basis for the arguments in Congress which caused the Capper-Kelly bill to include a "fair and open competition" clause similar to that contained in the present proposed amendment.

In my opinion, however, a full and sufficient answer to this argument is to be found in the fact that if such a condition should arise, the major substantive provisions of the Sherman law which prohibit contracts or agreements in restraint of trade, would be amply sufficient to repress and punish such practices.

(c) The present proposed amendment limits its beneficial purpose to contracts or agreements as follows:

"* * * when contracts or agreements of that description but not related to trade or commerce among the several States or with foreign nations are lawful under any statute now or hereafter in effect in any State, Territory, or the District of Columbia in which such sale at retail is to be made."

With hesitation, it is suggested that this language is confusing and difficult to understand. Apparently, it means that the proposed legalization shall not apply to intrastate transactions, except when such contracts or agreements are made lawful by the statute law of the State, Territory, or the District of Columbia wherein such transactions occur.

Under the confusion which I must frankly state that I rest with respect to this verbiage, it seems to me to be open to the objection that the proposed legislation contemplated by this amendment, cannot in any event have any application to intrastate transactions, whether or not the same are made lawful by the statute law of the particular State or Territory (this argument does not apply to the District of Columbia, for the Sherman law is fully applicable therein) in which they occur. If this be true, then the provision now under consideration is at least superfluous, and at worst, dangerous.

I defer further argument on this head, in the hope that Senator Radcliffe or Senator Tydings, will give me their views with regard to the precise meaning and need of this provision.

(d) The proposed amendment contains the further limitation that:

"* * * and the making of such contracts or agreements shall not be an unfair method of competition under section 5 of the Federal Trade Commission Act."

I venture the opinion that this provision is harmless, but it seems to me to be superfluous, and therefore useless. I say this because, notwithstanding the right to make such contracts or agreements which would be afforded if the proposed amendment be adopted, any transactions or any kind of actions, made or performed by any person pursuant to such new right, would in all respects be subject to section 5 of the Federal Trade Commission Act, even without the inclusion of such limitation in the proposed amendment. It seems to me clear that if any business concern should enter into contracts or agreements for resale price maintenance, after the adoption of the proposed amendment, and without the inclusion therein of this limitation, such business concern would unquestionably remain subject to the said provision of section 5, which reads:

"SEC. 5. Any unfair methods of competition in commerce are hereby declared unlawful."

I realize that if this argument rests solely upon the stated objection that it is superfluous, and therefore useless—the argument would not be very important. In fact, I am inclined to believe that the objection is not in fact very important. Nevertheless, and with full respect, it seems to me, by reason of its superfluity, to be a departure from the quality of scientific and technical accuracy which ought to characterize legislation.

(e) A desirable and welcome feature of the present proposed amendment, is its abandonment of practically all of the detailed and minute limitations which were contained in the Capper-Kelly bill, and which finally resulted in the debacle which that bill suffered when it was passed by the House of Representatives about 3 or 4 years ago, in a form so mutilated as to make it appear ridiculous. The debates which then took place in the House show that these additional limitations were made the subject of colloquial and lay criticism, facetious in part and destructive in part, which resulted in the complete mangling of the bill as first proposed, and left the entire subject in a state of confusion and disorder from which it has never emerged until the introduction in the Senate of the present proposed amendment.

Upon the basis of all of the foregoing, and with much diffidence, I venture the opinion, as I often stated and wrote to Representative Kelly, that this subject can be adequately and effectively dealt with on the broader lines of amendment mentioned in my attached letter to Senator Radcliffe, namely:

"Nothing herein contained shall be deemed, or interpreted so as, to prohibit agreements with respect to resale price maintenance."

This suggested amendment is, in its basic principle, the same as the amendment proposed by Senate bill 3518; but it omits all of the limitations contained in that bill, as well as all of the limitations which were contained in the Capper-Kelly bill, these latter limitations having been largely the casue of the many years of confusing debate which that bill encountered in Congress and which finally resulted in the debacle which that bill met, as above stated.

In thus eliminating the limitations contained in S. 3518 and in the Capper-Kelly bill, simplicity is obviously gained, with the advantage that (speaking in legal phraseology) the mischief sought to be remedied is remedied by direct and explicit language. By this it is meant to say that, whereas the Supreme Court in the *Dr. Miles Medical case*, and in many subsequent cases, declared that the Sherman law comprised a prohibition against contracts of resale price maintenance, this suggested amendment negatives these decisions in direct and explicit language. These decisions said that the Sherman law prohibits agreements of resale price maintenance; this amendment says that it does not.

It is submitted that further advantages are to be found in the fact that (provided that the arguments hereinbefore stated as to such limitations are accepted as sound) such proposed amendment would be free from the complication, uncertainity, superfluity, and difficulty of proof which the limitations contained in S. 3518 would probably create.

It is likely that such an amendment, with its omission of all limitations, would create initial objection in Congress; but, in view of the period of several years which has elapsed since this subject was last under debate in Congress—about 4 years ago with respect to the Capper-Kelly bill—and of the more accurate understanding of the subject which has consequently ensued, plus the much wider public understanding of the dangers and evils created by chain stores, mail-order houses, department stores, and other like large retailers, who, by widespread use of price-cutting practices, undermine the position of small retailers and often destroy them—it would seem that an adequately prepared report by the Senate Committee on the Judiciary, in support of the bill, after public hearings, at which the subject could be fully explained, and at which, for the first time, effective answer could be made to the unsound and specious arguments which were habitually advanced by chain stores, et id omne genus, at all of the hearings which were held on the Capper-Kelly bill—would overcome such objection.

It seems fair to say that the hearings which were held on the Capper-Kelly bill, were never properly handled by the proponents of that bill, and that they were entirely outmatched in skill and ingenuity by the able advocates furnished by the chain stores.

I am convinced that if a bill of the nature of S. 3518 be given serious attention, with complete and adequate study and preparation, it would command widespread and unanimous support by the entire legitimate (that is non-price-cutting) business of the United States.

In support of this statement, I call attention to the high authorities which are quoted in the attached "Druggists circular" article—these authorities comprising the late Mr. Justice Oliver Wendell Holmes, Mr. Justice Brandeis, and the Federal Trade Commission.

Respectfully submitted,

FELIX H. LEVY,
New York City.

JANUARY 25, 1936.

NOTE.—In support of the statements above made with respect to the difficulties which the Capper-Kelly bill met in Congress, it is suggested that an examination be made of the printed report of the hearings held on that bill about 3 or 4 years ago. I believe it was before the House Committee on the Judiciary, but I am not sure. I am unable to find my own copy of this report, and therefore suggest that if Senator Radcliffe can send me a copy of the same, I will examine it and furnish him with any references therein contained, which may be pertinent to the present subject.

SHERMAN LAW FOSTERS MONOPOLY

By FELIX H. LEVY, B. A., B. L., member of the New York Bar, former special assistant to the Attorney General

(Reprinted from the January 1927 issue of the Druggists Circular, 12 Gold Street, New York)

The December issue of the Druggists Circular contained a notable article written by Clyde L. Eddy, its managing editor, which forcefully discussed a present-day problem of constantly increasing importance. Supported by a con-

vincing array of facts, the article portrays the danger which confronts the continued existence of independent retailers growing out of the formidable opposition of chain stores, department stores, and mail-order houses.

The great size which these latter-day agencies of distribution have attained is generally conceded to be due to their resort to price-cutting methods. As is said in Mr. Eddy's article, this is proved by the fact that the percentage of business done by these chain stores is greater in the drug field—where there is a larger proportion of standard, price marked merchandise—than in any other. By virtue of the great financial strength possessed by each of these three agencies, price cutting as a "bait" for the sale of ordinary merchandise at profitable, and often excessive, prices, is possible, while to the independent and smaller retailer such a practice is impossible. The natural result is, as stated by Mr. Eddy, that trade drifts into the hands of chain and department stores, and independent retailers find it increasingly difficult to hold their ground successfully against these giant competitors.

Thirty years ago that great President, Grover Cleveland, in his annual message to Congress for 1896, indicated with prophetic vision the danger to the public welfare which lay in the tendency even then existing toward the crushing out of individual competition.

He said, "Another topic in which our people rightfully take a deep interest may be here briefly considered. I refer to the existence of trusts and other huge aggregations of capital, the object of which is to secure the monopoly of some particular branch of trade, industry, or commerce, and to stifle wholesome competition. When these are defended, it is usually on the ground that though they increase profits they also reduce prices, and thus may benefit the public. It must be remembered, however, that a reduction of prices to the people is not one of the real objects of these organizations, nor is their tendency necessarily in that direction. If it occurs in a particular case it is only because it accords with the purposes or interests of those managing the scheme.

"Such occasional results fall far short of compensating the palpable evils charged to the account of trusts and monopolies. Their tendency is to crush out individual intelligence and to hinder or prevent the full use of human faculties and the full development of human character. Through them the farmer, the artisan, and the small trader is in danger of dislodgment from the proud position of being his own master, watchful of all that touches his country's prosperity, in which he has an individual lot, and interested in all that affects the advantages of business of which he is a factor, to be relegated to the level of a mere appurtenance to a great machine, with little free will, with no duty but that of passive obedience, and with little hope or opportunity of rising in the scale of responsible and helpful citizenship. * * * Whatever may be their economic advantages, their general effect upon personal character, prospects, and usefulness cannot be otherwise than injurious."

Although these words were written nearly a generation ago and were particularly directed toward the great trusts and monopolies then existing, the argument which they present is forcefully applicable to the present situation where individual retailers are more and more being driven out of existence by aggregations of capital in the form of chain stores, department stores, and mail-order houses, thus forfeiting the "proud position of being their own masters" and being "relegated to the level of mere appurtenances to a great machine."

President Cleveland had in mind the need of greater exertion of the power of the Sherman law toward the repression of powerful trusts then in existence. As time went on, the power of that great law was successfully exercised in opposition to the trusts so that in 1911 the Supreme Court in its decisions against the Standard Oil Trust and the Tobacco Trust left no further doubt that trusts could not lawfully exist; and today there are no trusts of this nature any longer in existence. Their place has, however, been taken by aggregations of capital having great power of danger to the public welfare. It is an astonishing fact that the Sherman law which destroyed the trusts of the last generation has itself furnished the principal basis for the existence and growth of chain stores, department stores, and mail-order houses, with their ever-increasing menace to the continued existence of independent traders.

Prior to the year 1911, it was legally permissible, and it was the general practice, for manufacturers to require agreements from their customers that the latter would maintain the established resale prices of the manufacturers' products. In that year the Supreme Court rendered a decision holding that the Sherman law forbids such practice, and placed its decision upon the ground that a contract by which a producer binds a retailer to maintain the established selling price of

his trade-marked product is void, because it prevents competition between retailers of the article, and thereby restrains trade. As a matter of fact experience has shown that this decision has brought about the very result which it was its declared purpose to avoid, for the result of thus permitting price cutting, has been to enable the three modern agencies here under consideration, with their powerful resources, to drive independent retailers out of existence and to gain an ever increasing control upon the retail business of this country.

Leading jurists in this country and in Great Britain have earnestly argued against the evils which flow from price cutting. Mr. Justice Oliver Wendell Holmes said: "I cannot believe that in the long run the public will profit by this course, permitting knaves to cut reasonable prices for mere ulterior purposes of their own, and thus to impair, if not destroy, the production and the sale of articles which it is assumed to be desirable the people should be able to get."

Mr. Justice Brandeis, shortly prior to the time when he became a member of the Supreme Court, said: "When a trade-marked article is advertised to be sold at less than the standard price, it is generally done to attract business to the particular store by the offer of an obviously extraordinary bargain. It is a bait—called by the dealers a 'leader'; but the cut-price article would more appropriately be termed a 'mis-leader', because ordinarily the very purpose of the cut-price is to create a false impression." * * * "The evil results of price cutting are far reaching. It is sometimes urged that price cutting of a trade-marked article injures no one; that the producer is not injured, since he received his full price in the original sale to jobber or retailer; that the retailer cannot be harmed, since he has cut the price voluntarily to advance his own interests; that the consumer is surely benefited because he gets the article cheaper. But this reasoning is most superficial and misleading. * * * The process of exterminating the small independent retailer already hard pressed by capitalistic combinations would be greatly accelerated by such a movement. Already the displacement of the small independent businessman by the huge corporation with its myriad of employees, its absentee ownership, and its financial control, presents a grave danger to our democracy. The social loss is great; and there is no economic gain.

"But the process of capitalizing free Americans is not an inevitable one. It is not even in accord with the natural law of business. Shall we, under the guise of protecting competition, further foster monopoly by creating immunity for the price cutters? Americans should be under no illusions as to the value or effect of price cutting. It has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the cooperation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain; and, selling his birthright for a mess of pottage, becomes himself an instrument of monopoly."

These are strong words; but the distinguished source from which they come makes them food for serious thought. They indicate the fallacy of the glib argument that price-cutting is an advantage to consumers.

Other authorities equally distinguished have often shown that even if consumers were benefited, it does not follow that the public generally benefits, because in considering the public welfare, attention must be given not merely to consumers, but also and more particularly to producers and distributors, that is to manufacturers, wholesalers and retailers. This argument was forcefully presented by Lord Parker in a decision rendered by him in a leading case in Great Britain. He said: "In considering the interests of consumers it is impossible to disregard the interests of those who are engaged in such production and distribution. It can never be in the interests of consumers that any article of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production and distribution obtain a fair remuneration for the capital employed and the labor expended."

Similarly, the Federal Trade Commission in a unanimous report to Congress said: "The consuming public does not enjoy benefits by unfair price cutting to compensate it for the injuries following demoralization caused by price cutting. This for the reason that in the long run, unrestrained price cutting tends to impair, if not to destroy, the production and distribution of articles desirable to the public."

The injury resulting from price cutting is twofold, that is both to the manufacturer and to the independent retailer. As a result of price cutting, a manufacturer who has devoted a lifetime and has expended large sums of money in creating and advertising his trade-mark and has thereby created a valuable, and

perhaps the most valuable asset of his business, must stand helplessly and idly by, while his customers cut the price of his product and thereby grievously impair and often destroy the further value of such trade mark. For, obviously, if some or many of such customers cut the price below that which will yield a living profit, other dealers who are not willing or able to sell without a profit will cease to handle the article.

The evil effect of price cutting upon the independent retailer is so obvious that it requires no discussion. Mr. Eddy's article presents the argument unanswerably.

It thus appears that the Sherman law, designed by Congress for the repression of monopoly, has been converted into a powerful agency for the promotion of monopoly. For what else than monopoly is the present situation, where the channels of distribution are being more and more brought under the control of great aggregations of capital with the result that independent traders are driven out of existence? Surely this situation calls for a remedy. Its dangers were plainly forecast by President Cleveland. The remedy obviously is to restore the Sherman law to its original purposes, and by suitable amendment to make it again the enemy of monopoly and the champion of the individual trade. As long ago as 1908, William Howard Taft, later elevated to the Presidency and still later to the position which he now adorns as Chief Justice of the United States, said: "I am inclined to the opinion that the time is near at hand for an amendment of the antitrust law * * * making clearer the distinction between lawful agreements, reasonably restraining trade, and those which are pernicious in effect."

This statement plainly points out the remedy for the situation which has been here considered, namely, an amendment to the Sherman law, whereby agreements between manufacturers and distributors requiring the latter to maintain the sales price established by the manufacturer for his products, shall be deemed to be lawful. This would put an end to price cutting, would take away the powerful weapon possessed by chain stores and their like for the destruction of independent retailers, and would give to our citizens a free and fair field for competition. It would lessen, if not destroy, the growth of monopolistic aggregations of capital, and, as President Cleveland advocated, would restore the small trader to "the proud position of being his own master, watchful of all that touches his country's prosperity, in which he has an individual lot, and interested in all that affects the advantages of business of which he is a factor," instead of being "relegated to the level of a mere appurtenance to a great machine, with little free will, with no duty but that of passive obedience, and with little hope or opportunity of rising in the scale of responsible and helpful citizenship."

This great object can be attained by the addition of a simple amendment to the Sherman law as follows: "Nothing herein contained shall prohibit agreements with respect to resale price maintenance."

During the past 2 years many important trade associations have adopted resolutions asking Congress to enact an amendment of this nature: If the compact and well organized minority of price cutters were confronted, as they should be confronted by a properly organized movement on the part of the overwhelming majority of the businessmen of this country, who suffer grievously from the practices of the price cutters, the result could not be long in doubt. Concerted efforts should, therefore, be made by the trade organizations of this country to lay the facts before Congress and to ask for the relief to which they are so plainly entitled.

[From the Los Angeles News]

Complete Text, Fair Trade Act Decision—Fair Trade Law Is Sustained

The text of the majority opinion of the California Supreme Court opinion upholding constitutionality of the State Fair Trade Act and the text of two dissenting opinions is herewith presented:

BANK—L. A. 14662

Max Factor & Co., a corporation, and Sales Builders, Inc., a corporation, Plaintiffs and Appellants, v. Clarence G. Kunsman, Defendant and Respondent

This cause presents an attack upon the provisions of the "Fair Trade Act" adopted by the legislature in 1931 (Stats. 1931, p. 583; Deering's Gen. Laws, Act 8782), as amended in 1933 (Stats. 1933, p. 793; Deering's Gen. Laws, Act 8782).

These facts appear from the allegations of the complaint: The plaintiff, Max Factor & Co., a Delaware corporation, engaged in the manufacture of cosmetics and toilet articles manufactured by it under certain adopted and registered trade-marks. These trade-marks have long been used in connection with the manufacture, sale, and distribution of the cosmetics and toilet articles manufactured and sold by the corporation; that the corporation is the sole owner of the business and goodwill in the State of California and all the States in the United States connected with the distribution and sale of the articles associated with such trade-marks; that prior to the commencement of this action, Max Factor & Co. transferred and sold to the plaintiff Sales Builders, Inc., the exclusive right and privilege of distributing and selling in the States of the United States, including the State of California, the cosmetics and toilet articles then and thereafter manufactured by Max Factor & Co., and the good will pertaining thereto, with the right to use the trade-marks, and the sole right to sell and distribute the cosmetics and toilet articles in all these States. Plaintiff Sales Builders, Inc., has ever since been, and is, the sole owner of the exclusive right to sell and distribute in all of the States, including California, all of the cosmetics and toilet articles manufactured by the plaintiff Max Factor & Co., and associated with the use of the trade-marks adopted by Max Factor & Co.

The defendant is, and at the times mentioned has been, the owner, proprietor and operator of a retail drug store situated in the city of Beverly Hills in this State, and was, and now is engaged in selling at retail to consumers of cosmetics, toilet articles, and other merchandise.

For many years there has developed in the drug trade in California the practice of cutting prices, both wholesale and retail, of well-advertised commodities well known to the public, and sold and identified under distinctive trade-marks, brands, and names.

Such products have been, and are, offered by retail dealers at prices conspicuously lower than the market or established prices of said commodities as so-called "leaders", for the purpose of creating the impression that other goods of which the prices are not so well known are sold at corresponding reductions, and that all articles dealt in by the particular dealer are sold by him at less than they could be obtained elsewhere. The stores in which these practices are prevalent have become known as "cut-rate drug stores." The complaint here sets out at some length matter relative to the fact that the practice of cutting known and established prices has engendered a condition by which other dealers were forced to meet the cut prices advertised by their competitors, one cut producing another in retaliation, so that ultimately, in a particular community, well-known articles identified by trade-marks, brands, and names with an established price are offered at prices cut to a point which yield no profit, and in many cases represents a loss. Other alleged evils of the practice are set forth at length. It is also alleged that to remedy this evil the legislature of California has enacted the Fair Trade Act (supra), the constitutionality of which act is here sought to be established.

In order to protect itself against the alleged injuries and uneconomic practices described in the complaint, plaintiff Sales Builders, Inc., adopted a system of doing business, as set out in complaint, under which contracts are entered into between the plaintiff and its wholesale jobbing distributors, and between plaintiff and retail druggists and other persons, firms, or corporations selling the Factor products at the specified prices. The prices fixed and established by plaintiff Sales Builders Inc., in said contracts, it is alleged, are fair and reasonable, and no higher than is required to yield to distributors at wholesale and retail a reasonable compensation for their services. It is also alleged that, as known to defendant, practically all of the wholesale druggists in the State of California have executed these wholesale distributers' contracts, and practically all of the retail druggists in the State of California, including the prominent department stores dealing in cosmetics and toilet articles, have executed the retail distributors' contracts, and are observing and conforming with the terms of the contracts. Price-cutting on products of plaintiff Max Factor & Co. has ceased, and plaintiff Sales Builders, Inc., is enjoying, under the terms of the California Fair Trade Act, a reasonable profit from the sale of its goods, and immunity from destructive and uneconomic price-cutting The distribution of its goods has been unobstructed, and its business has been greatly benefited.

However, the defendant, a retail distributor of plaintiffs' goods, is engaged in selling such goods at prices conspicuously lower than other retail dealers in the state of California, in many instances at less than the cost of the commodities to the defendant, with the result that other dealers are forced to meet defendant's price competition by offering plaintiffs' goods for sale at prices competitive with

those quoted by defendant. Sales Builders, Inc., upon inauguration of its system of contracts heretofore referred to, tendered to defendant a contract and an opportunity to deal in plaintiffs' goods on the same terms offered to every other retail dealer in the commodity in the State of California. The defendant refused and declined to execute the contract or to conform to the system of distribution employed by Sales Builders, Inc., or to observe the sales price fixed in the contract.

The plaintiff Sales Builders, Inc., declined, and has continued to decline, to sell its commodities to the defendant unless and until the defendant enters into the tendered contract with plaintiffs. Defendant has proceeded, and is proceeding, to carry out the alleged unlawful and wrongful scheme, and, it is alleged, in so doing has been, and is, acting maliciously and without legal justification therfor. In pursuance and as part of the wrongful and unlawful plan and scheme, defendant, unbeknown to plaintiffs, has procured, and continues to procure, commodities manufactured by Max Factor & Co. bearing the trade-marks, brands, and names of Max, Factor & Co., and has sold, and is now selling, the commodities at prices less than the retail sales prices which are being sustained by substantially all of the retail dealers in cosmetics and toilet articles in the State of California. Defendant has been, and now is, engaged in informing retail dealers under contract with plaintiff Sales Builders, Inc., as well as the public generally, of defendant's intention to sell plaintiffs' goods at cut-rate prices, which act and the others in the complaint complained of are unduly influencing retail and wholesale distributors of Max Factor & Co.'s products; and the wholesale and retail distributors have complained that they will be compelled to cancel the contracts with plaintiff Sales Builders, Inc., and to sell the Max Factor & Co. products not in conformity with the terms of the contracts entered into by them, but at prices which will meet those announced by the defendant, and at which process the defendant sells at retail the Max Factor & Co. products. The result of such cancelation, it is claimed, will be the destruction of the business of plaintiffs and the goodwill pertaining thereto.

It is further alleged that the defendant threatens to, and will, unless restrained by judgment of Court, continue to sell and dispose of the products of the plaintiff Max Factor & Co. at retail prices less than the retail sales prices regulated by plaintiffs, the continuance of which acts will produce great and irreparable injury to plaintiffs in that it will be extremely difficult, if not impossible, to ascertain the amount of damage that will afford plaintiffs adequate relief for the loss of sales and the destruction of business of plaintiffs and the goodwill pertaining thereto. For these reasons, plaintiffs seek equitable relief by way of injunction against the wrongs complained of.

To the complaint containing the foregoing allegations, defendant interposed a general demurrer, which the trial court sustained without leave to amend. Judgment was thereupon entered for the defendant, and the plaintiffs have appealed, presenting the single question: "Is section 1½, added to the Fair Trade Act of the State of California in 1933 (Stats. 1933, p. 793, supra), constitutional?"

The title of the Fair Trade Act as passed in 1931 indicates its purpose. It is as follows: "An act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name." (Stats. 1931, p. 583). In its entirety, the act aims at preventing price-cutting of articles sold under a trade or brand name, or under a trade-mark. As amended in 1933 (Stats. 1933, p. 793), section 1½ provides, in order to accomplish the above purpose, that all retailers, whether the goods were originally sold to them under a contract fixing the resale price or not, who, have knowledge of such contracts of resale, must sell at not less than the fixed price. It is respondent's main contention that such a statute violates the due process and equal protection clauses of the federal and state constitutions, in that it denies to him the liberty and freedom of contract.

We think there are certain fundamental concepts which are decisive of the present case;

1. In the first place, this court has neither the power nor the duty to determine the wisdom of any economic policy; that function rests solely with the legislature. We recognize that economic and judicial thought is, and for many years has been, divided on the economic question as to the benefits to the consuming public of free and open competition, and its necessary corollary, price cutting. The Sherman and Clayton Anti-Trust Acts passed by Congress, and the Cartwright Act passed by our State legislature, and many other statutes, are indications that the particular legislatures involved, at the time such statutes were passed, were of the view that, from a social standpoint, free and open competition was desirable. The basis of this view is that, in the long run, it is against

public interest to allow the manufacturer, producer, or distributer to fix the resale price of an article. In recent years, there has developed, in opposition to the above views, the concept that a manufacturer of a trade-marked article that is sold in competition with articles of a similar nature and who has fixed a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the goodwill towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to use it in a misleading way to deceive the public. The basic theory on which this concept rests is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products. This latter protection is found in section 2 of the present act, which prohibits manufacturers contracting between themselves to fix the resale price.

As already indicated, the state legislature, by the adoption of the Cartwright Act, supra, adopted in 1907, partially, at least, the first economic policy above discussed. By the enactment of the Fair Trade Act in 1931, as amended in 1933, the state legislature, for reasons known to it and which we must presume were sufficient, has seen fit to attempt to change its former policy and to adopt the second economic concept above discussed. Insofar as the statute involves a mere change in the economic policy of the state, this court has no power or right to interfere. The members of the court may or may not agree with the economic philosophy of the Fair Trade Act, but it is no part of the duty of this court to determine whether the policy embodied in the statute is wise or unwise. It is primarily a legislative and not a judicial function to determine economic policy. The power of the Court is limited to determining whether the subject of the legislation is within the state's power, and if so to determine whether the means adopted to accomplish the result are reasonably designed for that purpose and have a real and substantial relation to the objects sought to be attained. These principles have frequently been stated by the United States Supreme Court. In the recent case of *Nebbia* v. *New York* (291 U. S. 502, at p. 537, 54 Sup. Ct. Rep. 505), Mr. Justice Roberts, speaking for the majority of the court said:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare and to enforce that policy by legislation adopted to its purpose. The courts are without authority either to declare such policy or, when it is declared by the legislature, to overrule it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' *Northern Securities Co.* v. *United States* (193 U. S. 197, 337–8). And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

"The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the

legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so, where as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

In *Central Lumber Co.* v. *South Dakota* (226 U. S. 157, 160, 33 Sup. Ct. Rep. 66) Mr. Justice Holmes stated:

"If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the borbidden act does not differ in kind from those that are allowed."

As was said In Re Lasswell, (1 Cal. App. (2nd) 183, 188, 36 Pac. (2nd) 678): "It is a salutary doctrine that statutes should be sustained by the courts wherever and whenever this is reasonably possible. It is the purpose, right and duty of the legislative branch of the government to enact such legislation as it deems desirable and its limitations are natural law and the written Constitution; the courts have no voice in the policy nor in the wisdom of legislative action; they construe the language of the statute and determine its constitutional status."

2. In the second place, it must be kept in mind that the present statute is one passed in the exercise of the state's police power, and so differs fundamentally from statutes passed by the federal government. The latter is, of course, limited by the powers enumerated in the Constitution, while the states are not subject to such limitation. When the statute is viewed from the standpoint of police power, it is at once apparent that it is not a complete answer to the question of constitutionality to merely point out that the statute restricts a retailer from selling property of a certain class owned by him at prices fixed by himself, and so, of course, restricts his freedom of contract. There is no constitutional right to own property, as such, free from regulation. That a state statute deprives a person of a right which he formerly possessed, whether it be a right to go where he pleases, conduct himself as he pleases, or buy what he pleases, or sell what he pleases at prices fixed by himself, does not per se brand the statute as unconstitutional. The process of civilization has consisted largely of the gradual regulation of the individual in his liberty of action and ownership of property for the public good. As society has become more complex, the necessity for such regulation has become more acute. Neither the state nor the federal constitution guarantees any person absolute liberty of action. The liberty guaranteed by our law is a liberty subject to regulation in the public good—an equal liberty rather than an absolute liberty. In *Jacobson* v. *Massachusetts* (197 U. S. 11, 26, 25 Supp. Ct. Rep. 358) this principle is expressed as follows: "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."

In holding a state statute constitutional which provided that all employees should be paid in cash and paid semimonthly, and that such regulation should apply even to existing contracts, the United States Supreme Court, in *Erie R. R. Co.* v. *Williams* (233 U. S. 685, 699, 34 Sup. Ct. Rep. 761), stated:

"The legislation having been passed in the exercise of the reserved power of the state, is it void, notwithstanding it prohibits both the plaintiff and its employees from contracting against its provisions? Plaintiff asserts the negative and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of this court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and

which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is in him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Under its police power, the state, in a proper case, has the power, acting in the interests of the general welfare, to regulate property and regulate property and contract rights, and this includes, of course, the power to regulate the right of free bargaining. The fact that a state can lawfully pass a statute requiring free and open competition, such as the Cartwright Act, supra, which regulates the rights of a manufacturer or producer and limits his freedom of contract, indicates this power exists.

The fact that a statute limits the right of free bargaining in other ways, does not, of itself, determine the validity of the enactment. There are innumerable illustrations of statutes, passed under the police power, which interfere with the right of free bargaining which have been upheld on the theory the regulation is in the public interest. There are limits to this power, of course, but within those limits the legislature is supreme. These limits cannot be fixed by precedent. As the State progresses, the police power, within reason, develops to meet the changing conditions. (*Miller* v. *Board of Public Works*, 195 Cal. 477, 484, 234 Pac. 381; *People ex rel* v. *Associated Oil Co.*, 211 Cal. 93, 100, 294 Pac. 717.)

Many illustrations of the power of the state to regulate, in the public interest, the right of free bargaining could be given. The United States Supreme Court has held that a legislature may (1) fix the charges the owners of grain elevators and warehouses may make (*Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517, 12 Ct. Rep. 468); (2) fix the charges of insurance companies (*German Alliance Ins. Co.* v. *Lewis*, 233 U. S., 389, 34 Sup. Ct. Rep. 612); (3) fix the time within which the services of employees must be paid for and provide for semi-monthly payments of wages, and prohibit contracts varying the times of payment (*Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 34 Sup. Ct. Rep. 761); (4) fix the fees chargeable by attorneys appearing for employees before Workmen's Compensation Commissioners (*Yeiser* v. *Dysart*, 267 U. S. 540, 45 Sup. Ct. Rep. 399); (5) fix the rate of pay for overtime work (*Bunting* v. *Oregon*, 243 U. S. 426, 37 Sup. Ct. Rep. 435); (6) establish maximum hours of labor for men in certain industries (*Holden* v. *Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383); (7) establish maximum hours of labor for women (*Muller* v. *Oregon*, 208 U. S. 412, 28 Sup. Ct. Rep. 324; *Miller* v. *Wilson*, 236 U. S. 373, 35 Sup. Ct. Rep. 342); (8) prohibit the payment of wages in advance (*Patterson* v. *Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. Rep. 821), (9) require loaves of bread of only a certain size to be sold (*Schidinger* v. *Chicago*, 226 U. S. 578, 33 Sup. Ct. Rep. 182); (10) establish maximum rentals (*Block* v. *Hirsh*, 256 U. S. 135, 41 Sup. Ct. Rep. 458; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170, 41 Sup. Ct. Rep. 465); (11) fix the maximum rate of interest chargeable on loans (*Griffith* v. *Connecticut*, 218 U. S. 563, 31 Sup. Ct. Rep. 132); (12) regulate the net weight of retail packages (*Armour & Co.* v *North Dakota*, 240 U. S. 510, 36 Supp. Ct. 440); (14) declare sales of commodities on margin or for future deliver void (*Booth* v. *Illinois*, 184 U. S. 425, 22 Sup. Ct. Rep. 425); (14) forbid unfair competition by charging of lower prices in one locality than those exacted in another (*Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 33 Sup. Ct. Rep. 66); (15) fix the retail price of milk (*Nebbia* v. *New York*, 291 U. S. 502, 54 Sup. Ct. Rep. 505).

In each of the above cases the police power of the state was held broad enough to warrant an interference with free bargaining. As was said by Chief Justice Hughes in *Miller* v. *Wilson*, supra, at page 380, "As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose."

The police power is no longer limited to measures designed to protect life, safety, health, and morals of the citizens, but extends to measures designed to promote the public convenience and the general prosperity (*People ex rel.* v. *Associated Oil Co.*,

supra; *Chicago B. & Q. Ry.* v. *Illinois*, 200 U. S. 561; 26 Supp. Ct. Rep. 341), and includes economic measures regulating competition. (*Northern Securities Co.* v. *United States*, 193 U. S. 197; 24 Sup. Ct. Rep. 436; *Nebbia* v. *New York*, supra.)

The above cases conclusively establish that there is no absolute right of free bargaining guaranteed by the constitution. Since, under the proper circumstances, the right of free bargaining can be, and in the past has been, regulated, it necessarily follows that, in a proper case, this power to regulate free bargaining includes the power to regulate the price. Every one of the cases above cited, and many more that could be cited, illustrate the breadth of the power invested in the state legislature to affect the terms of a business bargain between individuals, and in every case the regulation affected the price. As was said in the *Nebbia case*, supra (p. 532): "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago (*Munn* v. *Illinois*, 94 U. S. 113)."

Respondent seriously urges that the legislature can only regulate prices as to those articles "affected with a public interest." There are several answers to this contention. As already pointed out, this statute does not aim primarily at regulating prices, but at protecting the property and contract rights of the manufacturer, producer, distributer, and retailer. Moreover, the statute does not attempt to regulate the price of any one article. It may be that when the legislature attempts to regulate the price of a particular commodity, in order to justify classifying that article differently from other commodities, its purchase and sale must affect the public interest. But here the legislation affects an entire class of articles, which class, as will later appear, is reasonably the subject of classification. Another complete answer to this contention is that if the purchase and sale of any one article or entire class of articles is subject to regulation under the police power, for reasons already stated, then its purchase and sale does affect the public interest. This was the exact holding in the Nebbia case, supra, where, at pages 533 and 536, it is stated:

"Property does become clothed with a public interest when used in a manner to make it of public consequences, and affect the community at large. Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression.

"The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest', and 'clothed with a public use', have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon a proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The next major factor that must be emphasized is that the statute here involved is not solely a price fixing or regulating statute. It is true that the statute permits the producer to fix by contracts with his distributor, and the latter by contracts with retailers, the minimum resale price of the produce, and that by section 1½ of the act the minimum price so fixed is made binding on all retailers who have knowledge of the contracts, and in this sense it is a price regulating statute. However, to regulate prices as such was not the main purpose of the statute. The name or brand or trade-mark of the producer. As to such articles, the producer or manufacturer, through advertising or other means, has built up a goodwill in connection with the articles, which goodwill is a species of property entitled to protection. When the retailer sells such an article to a customer, the article is not sold solely on the reputation of the retailer, but partially, at least, on the reputation built up by the owner of the trade-mark, brand or trade-name. Moreover, section 1½ comes into operation only when the manufacturer or producer has entered into contracts fixing the resale price. The statute, as its title

indicates, by preventing price-cutting is aimed at protecting these valuable property and contract rights of the manufacturer or producer—rights just as valuable and just as much entitled to protection as the right of the retailer, who is attempting, by exercising his claimed right of freedom of action, to injure the property and contract rights of the manufacturer or producer. The statute, in other words, does not merely prohibit price-cutting in order to regulate prices, but prohibits price-cutting in an attempt to protect the validly acquired rights of others. The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. (*Lumley* v. *Gye*, 2 El. & Bl. 216). The statute here involved, in a large measure, merely, extends that common law doctrine to the transactions enumerated in the statute.

(4) Another important factor that must be kept in mind is that insofar as the Fair Trade Act permits the producer to fix the resale price of his product by contract, the act merely embodies a rule of law well settled in this state. In *Grogan* v. *Chafee* (156 Cal. 611, 105 Pac. 745) and in *D. Chiradelli Co.* v. *Hunsicker* (164 Cal. 355; 128 Pac. 1041) it was held that as far as articles in intrastate commerce are concerned, without statutory authorization the manufacturer, by contract with a retailer, may fix the resale price. The Fair Trade Act as passed in 1931 merely codifies the rule of those cases, which was partially changed by the Cartwright Act supra.

When the above concepts are applied to section 1½ of the Fair Trade Act, we have no hesitancy in holding that the section is constitutional. The object sought to be attained is clearly within the sphere of state regulation, and the means provided in the statute have a reasonable relation to this object. In our opinion the statute is neither arbitrary nor discriminatory.

California apparently is the first state to have passed a statute containing the provisions found in section 1½ of the Fair Trade Act. New Jersey, in 1916, however, passed a statute that permitted the manufacturer to fix the resale price of a trade-marked article, or article sold under a trade or brand name, by attaching a notice fixing the resale price to the container in which the article was sold. The resale price so fixed was made binding on all retailers. In *Ingersoll & Bro.* v. *Hahne & Co.* 88 N. J. Eq. 222; 101 Atl. 1030, 89 N. J. Eq. 332; 108 Atl. 128) the New Jersey court, in two opinions, held the statute constitutional on substantially the same reasoning set forth in this opinion.

Since the oral argument and submission of the cause, respondent has cited a decision of the New York Court of Appeals, in which that court held the New York Fair Trade Act unconstitutional. (*Doubleday, Doran & Co., Inc.* v. *R. W. Macy & Co., Inc.*, decided January 7, 1936, ——— N. Y. ——— 199 N. E. 409.) Because the New York act was copied almost verbatim from the California statute, respondent cites the opinion of the New York court as "strongly persuasive." We are not prepared to share counsel's optimistic view of the weight to be given the decision. While, on first impression, it seems entitled to the importance attached to it by respondent, we are of the view that, upon careful analysis, it loses its persuasive force. A brief discussion of the decision will, we believe, be helpful in throwing in relief some of the high lights of the situation now before this court. For several reasons, the decision of the New York court impresses us as not being in point in the discussion here. It is expressly limited to a declaration that section 2 of the New York act (identical with section 1½ of the California act) is unconstitutional "as applied to the facts set forth", which are different from those of the case now before this court. The plaintiffs in the New York case were Doubleday, Doran & Company, Inc., publishers, and Doubleday, Doran Book Shops, Inc., retailers. The contract mentioned in the decision is one between the publishing corporation and the retailing corporation. Aside from any inference to be drawn from the similarity of names, the opinion states that the two plaintiffs, in reality, were one and the same, for it refers to "the price which they (the plaintiffs) stipulated as a retail price in a contract between themselves." Other language indicates the book shop corporation is merely a subsidiary and agent of the publishing company. Again, the plaintiff publishers sold the books in question to the defendant without exacting or, insofar as appears, attempting to exact, from the buyer any restriction on the price for resale. In other words, the producer of goods placed a retail price upon its product by its own independent action, and voluntarily sold the goods to a retailer (Macy & Co.) for resale without seeking, or at least obtaining, any agreement by the retailer to observe any retail price.

In the action, it seeks to prevent the retailer, to whom it has sold the goods without restrictions, from selling the goods at prices less than those which the

producer saw fit to fix, in a contract between it and a subsidiary. The New York court accepts, for the purpose of the decision, the interpretation of the act as covering such situation, and, upon assumption, and apparently that assumption alone, holds section 2 of the act to be unconstitutional. The plaintiffs in the New York case allege only a single contract purporting to fix the resale prices, and that in a pretended contract made with itself, far different from the factual set-up in the Max Factor & Co. case. Here there has been adopted a system of making written contracts, generally between producers and retail distributors, under which the products may and will be sold only to retailers who will resell at specified prices and have entered into contracts with the distributor to so sell such products. Practically all of the wholesale and retail druggists in California have executed such contracts, and are observing them, and the plaintiffs' distributors have refused and will refuse, to sell such products to wholesalers or retailers who do not enter into such contracts. A contract has been tendered to defendant for execution, but defendant will not enter into the agreement. The plaintiffs therefore decline to sell the commodities to defendant unless the defendant enters into the contract. The defendant, with full knowledge of the system of contracts, and the extent of the execution and compliance with their terms by the trade, has obtained Factor products unbeknown to plaintiffs, and is selling them at prices less than the prices fixed by the contracts so extensively entered into by others. These facts serve to vitally differentiate the situation in New York from that here. In place of a single pretended contract made by the producer with itself, we have here a uniform system of contracts applied generally to wholesale and retail distributors in the state. In place of a voluntary sale without restriction by the producer to a retailer, there is here a consistent refusal by the producer or owner to sell to the defendant or to any other buyer who will not agree to maintain resale prices. A retailer who has been given an opportunity to enter into the contract has refused to do so, and, having obtained goods, not from the producer or owner, but indirectly and without the consent or knowledge of the producer, is engaged in cutting prices of the products. The New York decision does not discuss the fundamental basis and purpose of the legislation represented in the California Fair Trade Act, and does not disclose the ground upon which the section of the New York act, as interpreted for the purpose of the decision, is unconstitutional. We cannot find, in this casual treatment of a constitutional question, sufficient justification for regarding the decision as applicable to the facts here.

Respondent also urges that the statute ednies equal protection of the laws in that it applies only to articles sold under a trade-mark or trade or brand name, and does not apply to non-trade-marked commodities, and, among trade-marked articles, applies only to those in free and open competition with others of a similar nature. As already pointed out, it is only in reference to those commodities included within the statute that the manufacturer or producer has a property right in the nature of goodwill, which, in the public interest, should be protected. Such a classification is reasonable. The exclusion of trade-marked articles not in free and open competition with others of a similar nature is likewise reasonable. By that provision the public is protected from artificially high prices imposed by one with an exclusive market. (See *Borden's Farm Products Co.* v. *Ten Eyck, Commissioner*, decided by the United States Supreme Court February 10, 1936.)

The contention made by the respondent that the Fair Trade Act attempts to regulate interstate commerce, and so is unconstitutional, is without merit. The allegations of the complaint clearly establish that as to the transaction now before the court it is one arising and involving goods wholly located within this State. Although the terms of the statute are broad, and could conceivably be interpreted to include interstate transactions, we must necessarily construe the act as applying only to transactions within the state, that being the sole territorial extent of the legislature's powers. (*California Adjustment Co.* v. *Atcheson, Topeka & Santa Fe Ry. Co.*, 179 Cal. 140, 175 Pac. 682; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; 29 Sup. Ct. Rep. 511.)

Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. (*Dahkne-Walker Milling Co.* v. *Dondurant*, 257 U. S. 282; 42 Sup. Ct. Rep. 106.) The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court. Moreover, the principal remedy granted by the statute is injunctive relief. The equity court has broad and flexible discretionary powers, and can, and undoubtedly would, deny injunctive relief where such relief would be inequitable.

It is beyond denial that, under our form of government, the use of property and the making of contracts are normally matters of private concern. Here, no question of impairment of existing contracts is involved. No criminal proceedings have arisen under the circumstances of the case. The plaintiffs are seeking, in a civil action, to restrain conduct on the part of the defendant which the legislature, in determining a question of economic policy, has declared to be "unfair competition, and actionable at the suit of any person damaged thereby." We are of the view its action, measured by the yardstick of the cases cited, and other authorities of similar import, must be held to be free from constitutional objections, and, not being shown to be unreasonable or arbitrary, it must be sustained as a proper legislative declaration of the policy of the State on the practice of price-cutting. The demurrer of defendant to the complaint should have been overruled.

For the foregoing reasons, the judgment entered on the order sustaining the demurrer without leave to amend is reversed.

WASTE, C. J.

We concur: Curtis, J.; Langdon, J.; Seawell, J.
Factor v. *Kunsman*, L. A. 14662.

DISSENTING OPINION

I dissent. I cannot bring myself to agree with the majority opinion in this case. The question herein is not whether the court or the Legislature is authorized to determine the wisdom of an economic policy. It is, of course, elementary that it is beyond the function of the court to attempt to define or limit the economic policy or to determine the wisdom of a chosen course by the State. And it is also fundamental that simply because such determination does not fall within the judicial function it does not follow that it belongs in the legislatife field. It may be reserved by the State Constitution to the people, or the State may be prevented from acting by the inhibition of the Federal Constitution. The question, then, in this case may be phrased as follows: Has the Legislature exceeded its powers as limited by some inhibition of the Constititon in which the people have defined for themselves an economic policy and in which they have set up a safeguard against the infringement by the Legislature of some natural right with which they are endowed? If the act in question exceeds the legislative power thus measured, it is likewise beyond the judicial function to sap the inhibition or safeguard of its essential vitality, by construction, in order to accomplish or permit a course of action the court may deem to constitute a wise economic policy. (See opinion of Mr. Justice Burnett in *Ex Parte Newman*, 9 Cal. 502, 510, for a comprehensive statement of this principle.) The respondent insists that the section brought under our scrutiny in this cause does do violence to sections 1 and 13 of Article I and section 25 of Aricle IV of our State Constitution, as well as the fourteenth amendment to the Federal Constitution. It seems to me the argument in this regard is unanswerable. Section 1 of Article I reads as follows: "All men are by nature free and independent, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." Section 13 of the same article provides that no person shall "be deprived of life, liberty, or property without due process of law", which is, of course, in keeping with a portion of the fourteenth amendment to the Federal Constitution. Section 25 of Article IV forbids the enactment of special laws respecting enumerated subjects or where a general law can be made applicable.

Sections 1 and 13 of the First Article have been considered by this court in previous cases, and I believe if the amendment under attack is to be sustained, they must be directly overruled or the court forced to the extent of saying all trade-marked goods, including the specific item of cosmetics here involved, have been so devoted to a public use that they have become "affected with a public interest." I can scarcely believe that anyone would adopt the latter alternative. Hence I advert to the construing authorities. It was held in the early case of *Ex Parte Newman*, to which I have already referred, that the declaration of principles contained in Article I, and which were intended for the protection of every individual, "can be enforced by judicial determination." In *Ex Parte Quarg* (149 Cal. 79), this court proceeded to enforce the section upon which the respondent relies for his protection. With respect to an enactment which attempted to prohibit the sale of theater tickets at a price in excess of that originally charged, it is there said: "The constitutional guaranty securing to every person the right of 'acquiring, possessing, and protecting property' refers to the right to acquire

and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and in connection with the right of personal liberty, *it includes the right to dispose of such property* in such innocent manner as he please, and *to sell it for such price as he can obtain in fair barter*" (italic added). To the same practical effect is *Ex Parte Dickey* (144 Cal. 234), in which we find this expression: "This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations" (See also *In Re Smith*, 193 Cal. 337). Again *People* v. *Pace* (73 Cal. App. 548), after approving the language which we have quoted from *Ex Parte Quarg*, it was held that the Legislature could not require a person to secure a permit as a condition precedent to the sale of his own stock, although in repeated and successive transactions. The court said: "In these days when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts in the exercise of the particular functions imposed upon them by the Constitution, should scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents ofttimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation. • (*Dobbins* v. *Los Angeles*, 195 U. S. 223 (49 L. Ed. 169, 25 Sup. Ct. Rep. 18, see also, Rose's U. S. Notes); *Pacific Palisades Ass'n.* v. *City of Huntington Beach, et al.*, 196 Cal. 211 (40 A. L. R. 782, 237, Pac. 538).)"

There are a host of authorities from other jurisdictions which might be cited to the same effect, but for my purposes it will be sufficient to refer to but two. First we find comparable language in the case of *Tyson Bro.-United Ticket Office* v. *Banton* (273 U. S. 418), as follows: "In the endeavor to reach a correct conclusion in respect of this inquiry it will be helpful by way of preface to state certain pertinent considerations. The first of these is that the right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, *Case of the State Freight Tax* (15 Wall. 232, 278); and as such, within the protection of the due process of law clauses of the fifth and fourteenth amendments. See *City of Carrollton* v. *Bazzette* (159 Ill. 284, 294; 31 L. R. A. 522; 42 N. E. 837)." Second, I refer to *Doubleday, Doran & Company, Inc.*, v. *R. H. Macy & Co., Inc.*, (199 N. E. 409), which case involved a practically verbatim copy of the section here involved, adopted by the Legislature of New York. Bearing in mind that the New York Court of Appeals was the same court which first sustained the New York Mild Control Act (*People* v. *Nebbia*, 262 N. Y. 259), which was the subject of judicial inquiry in the case of *Nebbia* v. *New York* from which the majority opinion has quoted so extensively, the expressions we find in the case are especially illuminating. It is there said: "That the States cannot fix the selling price of any and all commodities has been settled. (*Williams* v. *Standard Oil Co.*, 278 U. S. 235; 49 S. Ct. 115; 73 L. Ed. 287; 60 A. L. R. 596; *Tyson & Bro.* v. *Banton*, 273 U. S. 418; 47 S. Ct. 426; 71 L. Ed. 718; 58 A. L. R. 1236; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; 43 S. Ct. 630; 67 L. Ed. 1103; 27 A. L. R. 128; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490; 37 S. Ct. 412; 61 L. Ed. 866; L. R. A. 1917 E., 1196, Ann. Cas. 1918 A., 955.)

"Books, at least these books, are not 'affected with the public interest' any more than theater tickets. No emergency has yet arisen in literary publications and the business is not such as comes within the class which must submit to rate fixing. Circumstances which cannot be foreseen from one generation to another may arise which will require certain articles to submit to regulatory prices in order that the public may get them at all or get them in a pure and beneficial state. We cannot always express legislative power in exact formulas nor decide a case before it happens. Experience is the mother of teachers. Under the *Nebbia Case*, for instance (*Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469), no one would doubt now that New York State would have the power to get milk to the public somehow if any combination of forces threatened to shut off all supply or to deteriorate that which was supplied.

The price might be an element to be considered with other things in such a case. So we thought in *People* v. *Nebbia*, 262 N. Y. 259, 186 N. E. 694, but to fix arbitrarily the price of books by legislation and not by agreement comes within the condemnation of the decisions which have heretofore dealt with like legislation. What the Legislature cannot do directly, it cannot do indirectly, nor does it cease to be a price fixed by the Legislature because that body has clothed the publisher with the power or authority to establish it." I think it so fundamental and so well established that the right to sell at any price obtainable by the owner is a part of the property itself and within the protection of the constitutional guaranties that I shall not devote more space to that thought.

However, it must be considered that there is a factor which takes some kinds of businesses outside of the strict protection of the inhibition, and to an ascertainment or rather statement (because it has heretofore been well explained and adhered to) of that element I now turn. What is it? For the purposes of a ready statement we say that where a business is "affected with a public interest" it is subject to regulatory measures. Just what is meant by the expression is well stated in *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 535, as follows: "Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are railroads, other common carriers, and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and grist mills. *State* v. *Edwards*, 86 Me. 102, *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 254.

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Again it is said in (p. 536): "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

Making the meaning of the unanimous court still more clear, the author of the opinion says (p. 537): "An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320); *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, it usually distinguishes private from quasi-public corporations.

"In nearly all the business included under the third head above, the thing which gave the public interest *was the indispensable nature of the service and the exorbitant charges and the arbitrary control to which the public might be* subjected without regulation." (Italic added.)

To revert to the case of *Tyson & Bro.* v. *Banton*, *supra*, for a moment we find apt language describing the expression as follows (p. 430): "The authority to regulate the conduct of a business or to require license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest' * * *

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that

the public derives benefit, accommodations, case or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood."

It can hardly be denied that the public is interested in the maintenance and continuity of the oil business, particularly as the same relates to the sale of gasoline and lubricating oils. And yet the Supreme Court of the United States denied the power of the Legislature to regulate the price in the case of *Williams* v. *Standard Oil*, 278 U. S. 235, 239, saying in part as follows: "It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' * * * By repeated decisions of this court, beginning with *Munn* v. *Illinois*, 94 U. S. 113, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property or services must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. * * *

"In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest'." I might add other authorities in which the legislative power has been denied, but there has never been a departure from the announced principle. Even in the case of *Nebbia* v. *New York*, *supra*, to which reference has been made, the court justifies its conclusion by the fact that milk was indispensable and that it was easily contaminable; that in order to secure pure and wholesome milk for the public during the emergency which the Legislature declared to exist it was necessary for the State to take control. The facts of the case when studied reveal that the comfort claimed to be found by appellant in the opinion does not in truth exist. And here I desire to point out a fallacy involved in the majority opinion. The language quoted is taken from cases involving businesses "affected with a public interest" as hereinbefore defined, or from authorities dealing with the health or public safety. The result is that the language, lifted from its context and placed in a different setting, takes on a meaning altogether foreign to that which it originally possessed.

Nor can it be seriously contended that the amendment is not a price fixing statute. It fixes the price indirectly and it has this additional vice, that it leaves the fixed price to the dictates of the producer—in other words, the Legislature has, as said in the Doubleday-Doran case, attempted to delegate authority to the producer of a trade-marked article to set the retail price. No one can object to the contract which he may enter into, but to make this contract binding by legislative fiat as to retail price upon persons who are not privy thereto violates every principle guaranteed the individual by the constitutional guaranties. The element of knowledge on the part of the seller is a minor factor, provided very simply by notice on the goods or label. It is manifest that the act here in question was not based upon the public interest, or that the consumer was considered. Its effect is to grant to the producer a privilege and preference unwarranted by the basic law. Not only that—but seeking to justify its enactment upon the theory that it is designed to prevent price cutting which injures a competitor, it reaches all merchants who, though they may be satisfied with a smaller profit than others engaged in the business, or who by reason of a greater efficiency are able to sell at lower prices and yet make the same profit, are still compelled to exact from the consumer a fixed retail price. It strikes at every merchant alike, regardless of intention, who desires to manage and control his own business. It is thus made perfectly clear that the object of the act is not to prevent unfair competition but to

fix prices. Such being its purpose and operation, it falls under the condemnation of cases involving similar efforts, such as *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1 and the other cases already cited.

But the amendment has other fatal defects. A study of the authorities which deal with the regulation of businesses, both those which sustain and those which reject the claim of legislative power, reveals that the question of whether all the surrounding circumstances have operated to change the status of a private business free from legislative regulation into one in which the public has an interest is one for judicial inquiry and determination (*Wolff Packing Co.* v. *Court of Industrial Relations, supra*). But the act here in question attempts to lump all businesses into a common regulatory basket, provided only that the product is trademarked and is originally in competition.

I have already mentioned the fact that the Legislature has attempted to delegate the price fixing power to the producer or manufacturer. Before concluding, I wish to direct attention to the almost obvious and inescapable fact that there is no authority in the law for such action. A person may not be bound with respect to his property by the action, whim, or caprice of another, particularly where the latter is not vested with any official responsibility or duty. The delegation of such power is contrary to the fourteenth amendment to the Federal Constitution. (*Washington* v. *Roberge*, 278 U. S. 116, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 55 Sup. Ct. Rep. 241.) Of course, I concede the producer's rignt to sell or not to sell at nis own price, but when his property has been sold and passed into hands not hampered by contractual covenants tne producer's control and right therein has altogether ceased. It takes no great amount of imagination to visualize the discriminatory practices and abuses which might be indulged were the power of the producer to establish a fixed retail price upheld.

Since the preparation of the foregoing opinion I have read the dissenting opinion by Mr. Justice Shenk and desire to express my concurrence therein.

The judgment should be affirmed.

THOMPSON, J.

Max Factor & Co. et al. v. *Kunsman.*

In concurring in the dissent of Mr. Justice Thompson I desire to comment on certain matters not touched upon in his opinion. In the first place let me point out that the particular statute under attack should not be confused with the Unfair Practices Act of 1935 (Stats. 1935, p. 1546), which denounces unfair competition and so-called piratical trade transactions, and was designed to afford full relief against such abuses on behalf of any one aggrieved. That act is said to have been passed at the behest of the business interests of the state including the manufacturer, middleman, and retailer. While the validity of that statute has not been passed upon by this court it is enough to say for present purposes that it appears to be a painstaking endeavor by the legislature to combat the abuses which the business interests have deemed unfair practices in the competitive field. It appears to have been designed to permit fair competition to function under its own economic laws.

The act now under attack as originally passed in 1931 was confined to the field of contract in the fixing of prices by agreement as between manufacturer, jobber, and retailer, and when so limited no valid objection to it has been pointed out. It is the amendment of 1933 which makes the prices so fixed binding on all who are not parties to the contract. In other words it places within the power of the manufacturer or producer to fix the retail price of all commodities regardless of their reasonableness. It does not purport to denounce unfair competition alone but affects fair competition as well. Carried to its length it would enable the manufacturer or producer to destroy all competition and thus place the consumer at their uncontrolled mercy even as to food, clothing, and all commodities which are the subject of manufacture or production. This, too, without regard to serious marketing problems which have confronted some of the basic industries of the state. It is said that whether these results should follow is an economic problem with which the courts have nothing to do. But it is the business of the courts to see to it that, in carrying out any such program, the fundamental and guaranteed rights of the citizen to deal with his property as he chooses, subject to such reasonable regulations as may properly be imposed, are not destroyed. The statute under attack does not regulate. It prohibits. It is essentially a price fixing statute. To me it is beyond question that the legislature itself could not fix the retail prices of all or any commodities not affected with a public interest or clothed with a public use. We are bound by the decisions of the supreme court

of the United States on that subject, as pointed out in the opinion of Mr. Justice Thompson. If the legislature itself is without power to fix the retail price of such commodities, how then can it delegate that power to one who is governed by no power except his own self interest?

It is said in the majority opinion that the statute under attack is confined to retail prices of trade-marked or branded commodities; that this is a valid classification and that the legislature has the right to single out commodities so marked as a proper subject of preferment. This is not so, for the reason that there is no limitation on the acquisition of trade-marks and brands, except the ingenuity, or lack of it but aided by prize contests, on the part of the manufacturer or producer in conjuring up names to suit his purposes. He then may acquire an exclusive right to the name under sections 3196 to 3202 of the Political Code. Under this easy plan all commodities, essential or otherwise, may be trade-marked or brandea. It does not follow that because the right to the use of the name is exclusive, the right to shackle the commodity with a retail price is vested in the owner of the name, regardless of where the commodity may find itself in the channels of trade, divorced from any contractual relation with the owner of the name.

As to the price-fixing feature of the statute the highest court in the land has spoken in terms which I feel bound to respect. Also, the state of New York enacted the same statute now under attack. The highest court of that state recently and correctly held it void under the federal constitution. In deference to what I deem to be the established law I arrive at the same conclusion.

SHENK, J.

IV. NEW YORK COURT OF APPEALS OPINION ON FAIR TRADE ACT

Following is the text of the Court of Appeals decision on the Crawford Fair Trade Practice Act.

Doubleday, Doran & Co., Inc., and Doubleday, Doran Bookshops, Inc., plaintiffs-appellants.

Against R. H. Macy & Co., Inc., defendant-respondent.

Appeal by the plaintiffs from a judgment of the Special Term which dismissed the complaint.

CRANE, *Chief Judge*: An appeal taken directly to this court from a dismissal of the complaint by the Special Term of the Supreme Court held in Westchester County, brings up for determination solely the constitutionality of chapter 976 of the laws of 1935. The Special Term held it to be unconstitutional.

The action is brought to restrain R. H. Macy & Co., Inc., from offering for sale three books at a less price than that fixed by the publisher. The complaint alleges that Doubleday, Doran & Co., Inc., is a publisher and manufacturer of books, and that Doubleday, Doran Bookshops, Inc., is a seller and distributor of books at retail.

All books sold by Doubleday, Doran & Co., Inc., to Doubleday, Doran Bookshops, Inc., are sold under contracts betwen the parties with certain provisions that the buyer will not resell such books except at the prices stipulated by the vendor.

The prices thus stipulated were for the book called Some Day, $2, at retail; for Vogue's Book of Etiquette, $3 and for The Garden Notebook, $1.50. The complaint then sets forth that R. H. Macy & Co., Inc., has purchased these books and is advertising them for sale at the respective prices of $1.76, $2.64, and $1.31 per volume. Macy and Co. purchased the books for resale under no contract limiting the price, and none is alleged.

NO CONTRACT INVOLVED IN SUIT

The plaintiffs do not claim that Macy is bound by any agreement but that it is forced by the provisions of chapter 976 of the laws of 1935 to conform to the price which they stipulated as the retail price in a contract between themselves; that is, a contract of sale between Doubleday, Doran & Co., Inc., and Doubleday, Doran Bookshops, inc.

Although the publisher sold the books to Macy without any restrictions as to price, it now says the law prevents Macy from disposing of them at a lower figure than that fixed by the publisher with another. What is this law which has thus undertaken to supplant contracts? We give it in full:

"Section 1. Subdivision, no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of New York by reason of any of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell such commodity except at the price stipulated by the vendor.

"(b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

"CASES WHERE PROVISIONS APPLY

"2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

"(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

"(b) When the goods are damaged or deteriorated in quality and notice is given to the public thereof.

"(c) By an officer acting under the orders of any court.

"Section 2. Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

"Section 3. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

"Section 4. The following terms, as used in this act, are hereby defined as follows:

" 'Producer' means grower, baker, maker, manufacturer, or publisher. 'Commodity' means any subject of commerce.

"Section 5. If any provision of this act is declared unconstitutional, it is the intent of the Legislature that the remaining portions thereof shall not be affected and that such remaining portions remain in full force and effect.

"Section 6. This act shall take effect immediately."

DECISION BASED ON SECTION 2

Section 2 is that part of the law which is questioned in this case. The interpretation given below to this section and by all the parties apparently is that it attempts to accomplish just what the plaintiffs claim for it, as stated in the complaint and as given above. But for this we would have grave doubts whether the Legislature ever intended to fix the price of books after they had been purchased in the open market under no agreement as to resale price. Thus it is possible to read Section 2 as referrng to the contract made under Section 1, or, as binding on those books like an equitable servitude which had been parted with under a contract as to resale price.

However, for the purposes of this appeal we confine ourselves to the question of the constitutionality of the statute as construed by the parties and the court below and treat this section as allowing book pricefixing in the absence of contract made by the purchaser or his agents.

We agree with Special Term that, if this be its meaning, the law is unconstitutional. That the States cannot fix the selling price of any and all commodities has been settled. (*Williams Co.* v. *Standard Oil Co.*, 278 U. S. 235; *Tyson & Bro.* v. *Banton* ,273 U. S. 418; *Wolff* Co. v. *Industrial Court*, 262 U. S. 522; *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490.)

Books, at least these books, are not "affected with a public interest" any more than theatre tickets; no emergency has yet arizen in literary publications, and the business is not such as comes within the classes which must submit to rate fixing.

CONTRASTED WITH MILK LAW

Circumstances which cannot be foreseen from one generation to another may arise which will require certain articles to submit to regulatory prices in order that the public may get them at all or get them in a pure and beneficial state. We cannot always express legislative power in exact formulas nor decide a case before it happens. Experience is the mother of teachers.

Under the *Nebbia case*, for instance (291 U. S. 502), no one would doubt now that New York State would have the power to get milk to the public somehow if any combination of forces threatened to shut off all supply or to deteriorate that which was supplied. The price might be an element to be considered with other things in such a case. So we thought in 262 New York 259.

But to fix arbitrarily the price of books by legislation and not by agreement comes within the condemnation of the decisions which have heretofore dealt with like legislation.

"What the Legislature cannot do directly it cannot do indirectly, nor does it cease to be a price fixed by the Legislature because that body has clothed the publisher with the power or authority to establish it."

For a publisher to agree with its subsidiary or agent to the price of a book which shall thereafter bind all other parties who purchase like books from the publisher is in reality a method whereby the Legislature fixed the price; it is a species of delegated authority.

PLAINTIFF "NOT OBLIGED TO SELL"

The plaintiff, Doubleday, Doran & Co., Inc., the publisher, was not obliged to sell Macy & Co.; it could do so or not as it pleased, and it could refuse to sell because Macy was cutting the price (*U. S.* v. *Colgate & Co.*, 250 U. S. 300).

Even this right, however, may have its limitations (*Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U. S. 441). The publisher made no such refusal; it sold Macy.

Likewise the publisher could have bound Macy by contract not to sell below a fixed price even though the restriction might not extend further to one who subsequently purchased without restrictive stipulation. (*Dr. Miles Medical Co.* v. *Park and Sons Co.*, 220 U. S. 373; *Boston Store of Chicago* v. *American Graphophone Co.*, 246 U. S. 8; *Bobbs-Merrill Co.* v. *Strauss*, 210 U. S. 339; *Park & Sons* v. *National Druggists Association*, 175 N. Y. 1.) Macy bought from the publisher or someone else these books without any agreement as to their resale price.

The license or agency agreements have no application to the facts here before us (*U. S.* v. *General Electric Co.*, 272 U. S. 476).

The judgment below, declaring Section 2 of Chapter 976 of the laws of 1935 unconstitutional as applied to the facts set forth in the complaint, is affirmed with costs.

Court of Appeals.—Seeck & Kade, Inc., plaintiff-appellant, against R. Tomshinsky, individually and trading as Webster Cut Rate Stores, also as Webster Cut Rate Pharmacy, and Webster Cut Rate Drug Stores, Inc., defendants-respondents.

Judgment of the Special Term Dismissing the complaint affirmed with costs, on the authority of *Doubleday, Doran & Co., Inc.,* v. *R. H. Macy & Co., Inc.,* handed down herewith.

END OF
TITLE